IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-339

FUCHS SUGARS & SYRUPS, INC.
and FRANCIS J. PRAEL,
doing business as LEWIS & COMPANY,

Petitioners,

—against—

AMSTAR CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

H. RICHARD WACHTEL
LEBOEUF, LAMB, LEIBY & MACRAE
*Attorneys for Petitioners,
Fuchs Sugars & Syrups, Inc.
and Francis J. Prael*
Office and P.O. Address
140 Broadway
New York, New York 10005
(212) 269-1100

Of Counsel:

GRANT S. LEWIS
JOHN S. KINZEY, JR.
WILLIAM G. PRIMPS

TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Question Presented	3
Statutes Involved	4
Statement of the Case	4
The Parties	4
Plaintiffs	4
Amstar	6
Amstar's Five-Year Plan	6
Proceedings Below	11
The District Court	11
The Court of Appeals	14
Reasons for Granting the Writ	16
I. The Court of Appeals' Requirement of Proof of Coercion in Order to Prove a Section 1 Combination Conflicts with *Albrecht* and Other Decisions of this Court	16
II. The Court of Appeals' Requirement of Coercion for an *Albrecht* Combination Conflicts with the Decisions of Other Courts of Appeals	24
III. The Court of Appeals has Erroneously Decided an Important Question of Federal Law	26
Conclusion	28

TABLE OF AUTHORITIES

Cases: PAGE

Albrecht v. Herald Co., 390 U.S. 145 (1968) 3, 14, 17-18, 19, 20, 21, 22, 23, 25

Blankenship v. The Hearst Corp., 519 F.2d 418 (9th Cir. 1975) 24, 25

Bowen v. New York News, Inc., 522 F.2d 1242 (2d Cir. 1975), *cert. denied*, 425 U.S. 936 (1976) 14

Bushie v. Stenocord Corp., 460 F.2d 116 (9th Cir. 1972) 24, 25

Federal Trade Commission v. Beech-Nut Packing Co., 257 U.S. 441 (1922) 21

Frey & Son v. Cudahy Packing Co., 256 U.S. 208 (1921) 21-22, 23

Friedman v. Thorofare Markets, 587 F.2d 127 (3rd Cir. 1978) 24, 25

Greenville Publishing Co., Inc. v. Daily Reflector, Inc., 496 F.2d 391 (4th Cir. 1974) 24

Jacobson & Co., Inc. v. Armstrong Cork Co., 548 F.2d 438 (1977) 25-26

Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970) 24, 25

Morton Buildings of Nebraska, Inc. v. Morton Buildings, Inc., 531 F.2d 910 (8th Cir. 1976) 23, 24

Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc., 526 F.2d 1196 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976) 24-25

PAGE

United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944) 21, 22, 23

United States v. Parke, Davis & Co., 362 U.S. 29 (1960) 20, 21, 22, 23, 26

United States v. Schrader's Son, Inc., 252 U.S. 95 (1920) 17, 21, 22, 23

STATUTES

Clayton Act, § 4 (15 U.S.C. § 15) 2, 4

Clayton Act, § 16 (15 U.S.C. § 26) 2

Sherman Act, § 1 (15 U.S.C. § 1) .... *passim*

Sherman Act, § 2 (15 U.S.C. § 2) 13

28 U.S.C. § 1254(1) 2

28 U.S.C., § 1331(a) 2

MISCELLANEOUS AUTHORITIES

Areeda, Antitrust Analysis, 567 (1974) 18

Baker, *Combinations and Conspiracies—Is There a Difference?*, 14 Antitrust Bull. 71 (1969) 18

Eichner, *The Emergence of Oligopoly, Sugar Refining as a Case Study*, 193 John Hopkins (1969) 4

Handler, *Through the Antitrust Looking Glass—Twenty-First Annual Antitrust Review*, 57 Calif. L. Rev. 182 (1969) 18

PAGE

Handler, *Twenty-Fifth Annual Antitrust Review,* 73 Colum. L. Rev. 415 (1973). 18

Posner, *Antitrust Policy and the Supreme Court; An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions,* 75 Colum. L. Rev. 282 (1975). 18

Sullivan, Antitrust §§ 139, 140 (1977) 18

An Interview with Hon. Donald F. Turner, 37 Antitrust Law J. 290 (1968). 18

The Developing Theory of Combination under Section 1 of the Sherman Act: Another Requiem for Colgate Albrecht v. Herald Co., 57 Calif. L. Rev. 262 (1969). 18

The Supreme Court, 1967 Term, 82 Harv. L. Rev. 95 (1968). 18

10 B.C. Indus. & Commercial L. Rev. 208 (1968-1969) 18

37 U. Cin. L. Rev. 411 (1969) 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. ______

FUCHS SUGARS & SYRUPS, INC.
and FRANCIS J. PRAEL,
doing business as LEWIS & COMPANY

Petitioners,

—against—

AMSTAR CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Fuchs Sugars & Syrups, Inc. and Francis J. Prael, plaintiffs below ("plaintiffs"), respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit, filed June 8, 1979, reversing a judgment of the District Court entered following a jury verdict that respondent Amstar Corporation ("Amstar") had violated Section 1 of the Sherman Act and that plaintiffs had been injured in the amount of $150,000 before trebling.

Opinions Below

The opinion of the Court of Appeals is unofficially reported at 1979-1 CCH Trade Cases ¶ 62,700 and is reprinted in the attached Appendix at A1-A14. The Court of Appeals' decision denying rehearing is reprinted at A15. The opinion of the District Court denying Amstar's motion for judgment n.o.v. following a three-week trial is reported at 447 F. Supp. 869 (S.D.N.Y. 1978), and is reprinted at A16-A48.

Jurisdiction

The decision of the Court of Appeals was filed on June 8, 1979. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on July 18, 1979. This Court has jurisdiction to review the decision of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1). Jurisdiction in the District Court was based on 15 U.S.C. §§ 15 and 26 and 28 U.S.C. § 1331(a).

Question Presented

In this private antitrust action, the District Court held that *Albrecht v. Herald Co.,* 390 U.S. 145 (1968) permitted the proof of a Sherman Act, Section 1 combination between a manufacturer and certain of its distributors if the evidence proved that those distributors had "knowledge of the [manufacturer's] purpose" to stabilize prices, that they "materially aided and abetted the overall plan" and that their cooperation was needed "for the plan to succeed". (A28, A34) The District Court held that if these facts were proved a combination was formed even if coercion was not employed in carrying out the plan. (A29-A33) The Court of Appeals, limiting itself to the question of combination, held this ruling to be erroneous as a matter of law and reversed. (A13-A14)

We respectfully urge this Court to grant certiorari to decide the following question relating to the proof of combination in an action under Section 1 of the Sherman Act:

> Did the Second Circuit correctly decide that the only combinations between a manufacturer and its distributors reached by Section 1 are those which require the use of coercion to achieve an anticompetitive goal; and that, if a manufacturer has combined with certain distributors because their cooperation was necessary to reach the anticompetitive goal, but it was unnecessary to force others to join the scheme, the proof of combination is insufficient as a matter of law?

Statutes Involved

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations, is declared to be illegal . . . ."

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides in pertinent part:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Statement of the Case

The Parties

Plaintiffs

Plaintiffs are general (non-exclusive) sugar brokers. General sugar brokers have acted as distributors of refined sugar in the United States since the late nineteenth century.* Until the events leading to this action, general sugar brokers represented almost all sugar refiners in the sale of their products. Amstar, as did the other refiners, sold a great deal of its sugar products through them. In

* *See* A. Eichner, *The Emergence of Oligopoly, Sugar Refining as a Case Study,* 193-94, John Hopkins (1969), admitted into evidence at the trial as plaintiffs' exhibit 57.

the New York area alone, Amstar's distribution through general sugar brokers represented 75% of all of Amstar's sales. (650a, 652a)*

It was stipulated that, although they did not take title to the sugar they sell, the general sugar brokers competed with each other for customers' patronage, and their activities affected the price at which the product was sold. (116a, 120a) The competition among them was so vigorous that an Amstar officer reported that, as a consequence of their activities, "the lowest price then becomes the common denominator in a particular market." (94e-95e) Other Amstar documents referred to the "fierce competition [among general sugar brokers] which has always ended with a lower price", and described the "disarray within the industry" and "chaotic marketing condition" which their activities caused. (35e, 94e, 40e) A former Amstar sales manager testified at the trial that Amstar's sugar markets had suffered from a "deterioration of prices" because of the competition among these brokers. (369a) In another case in which Amstar was defending price-stabilizing charges, Amstar sponsored the affidavit of an economist who described the activities of non-exclusive (i.e. general) sugar brokers as follows:**

> "The participation of non-exclusive brokers in certain sugar sales transactions may have great economic sig-

* Citations to "a" pages refer to the Joint Appendix filed with the Court of Appeals, and references to "e" pages designate the Exhibit volume before that court.

** February 29, 1976 Affidavit of Professor Kenneth G. Elzinga, filed by Amstar and other refiner defendants in *In re Sugar Industry Antitrust Litigation,* M.D.L. No. 201 (N.D. Cal.). Plaintiffs brought Professor Elzinga's affidavit to the Court of Appeals' attention after Amstar had, for the first time in this litigation, referred to allegations made in M.D.L. No. 201 in its principal brief.

nificance. First, brokers are typically compensated on a per volume basis and not on the basis of the sales price; therefore, their economic incentive is to sell more sugar, which can often best be accomplished by decreasing price. Second, because they represent more than one producer, they can 'shop' for the best price for sugar buyers and thus provide a natural negotiating force." (¶ 62)

As described *infra* at 6-11, in 1969 Amstar embarked on a multi-phase program to limit the general brokers' ability to bring competitively-priced products to customers, and ultimately to convert some of the general brokers into exclusive sales agents and to terminate the rest. Plaintiffs are two of the fifteen general sugar brokerage firms which were terminated on April 1, 1974, the thirteen others having accepted monetary settlements in exchange for releases.

Amstar

Amstar is the nation's largest seller of refined sugar products. (A4) It sells to industrial users such as bakers, bottlers and food companies, and its products packaged under its Domino and Spreckels labels are sold to the institutional and grocery markets. During the years in question, its market share ranged from 45% to 50% in the Northeast generally to in excess of 75% in some eastern states. (A21; 1508a-1510a; 159e, 198e)

Amstar's Five-Year Plan

Much of the three-week trial in the District Court was spent in the proof of the steps Amstar took in carrying out a written plan, prepared in March 1969, which the District Court's decision denying judgment n.o.v. described

as a "multi-phase five year plan for the control and eventual elimination of general sugar brokers". (A19) The plan (called "Operation Mousetrap" in a later memorandum prepared by the executive who drafted the plan) was designed to resolve the problem that "The general broker currently has too much leverage in the matter of price determination". (1e, 89e) Later documents emphasize Amstar's dilemma that, although it was the dominant seller in an oligopolistic industry (A3n.1, A21) and although, as its vice president for sales wrote, "it is incumbent upon Amstar to assume the leadership in establishing new levels of selling prices", the brokers had so disrupted the market that, he said, even Amstar had no "clear idea of what the 'price'" was at any particular time. (95e)

The written plan itself demonstrates that it was possible to accomplish the objective (stated in the first sentence of the plan) to "eliminate the 'general broker' concept" only by enlisting the aid of certain general brokers in a "'divide and conquer' technique". (87e, 90e) The plan discussed the desirability of using "our own very considerable leverage" by holding out "the possibility of his [certain general brokers] becoming our direct broker[s]", and spoke of the "plums" which would be used to "woo" certain of the general brokers into cooperating. (90e) During the next five years, a number of methods were employed to control the general brokers, including the agreement of some of them in 1972 to forego bringing to customers lower-priced sugar of other refiners by participating in an Amstar brokerage scheme which rewarded sales at list prices while penalizing brokers for sales made below list. (A22 n.5)

The District Court's decision denying judgment n.o.v. describes most of the measures taken by Amstar to lessen the effect of the general brokers' activities on the sugar market and permit Amstar to stabilize and increase prices—not just its own prices but the prices of refined sugar throughout the United States.* The District Court outlined the evidence proving that Amstar had combined with one broker "in order to reduce interbrand competition, stabilize prices and eliminate general brokers," and also reviewed the evidence showing that, in the course of implementing its so-called Operation Mousetrap, Amstar had used "threats, selective terminations and territorial and customer restrictions to control general brokers". (A29-A30) The territorial and customer restrictions were accomplished with the agreement of the brokers affected by them.

These measures accomplished little for Amstar. With three-quarters of its products being sold by general brokers, its sugar products were still being priced as if it were many smaller companies rather than one large one. Its announcement of a list price had little effect on sugar

* That Amstar's efforts to establish price stability were directed not only at products being sold by Amstar is established by its own internal documents. As discussed on the preceding page, one of Amstar's highest executives had written of the need to reduce industry-wide "disarray" resulting from broker activity and to assert Amstar's "leadership". (94e, 95e) An Amstar employee closer to the day-to-day workings of the market had, in a memorandum foreshadowing the 1972 program of penalizing brokers for off-list prices, posed the question: "[W]hat are we trying to accomplish? If a broker correctly advises a customer that a refiner has offered a price to him to offer a customer, we can't stop that but we will prevent a broker from going to a refiner and get him to cut his price. In fact, the reverse may be true where brokers may advise particular refiners not to cut prices. . . . This will place more responsibility on the broker to look at the entire market rather than specific accounts." (36e)

prices in the industry. (A22-A23; 37e; 93e-95e) Amstar's leadership was not effective because, at any time in question, each of the general brokers who was selling its sugar might present Amstar with a different competitive pricing situation which it was required to meet or else lose the business. That price became the price (or close to it) for all of the general broker's customers and soon spread throughout the entire industry. (94e-95e) With market prices constantly changing in reaction to general broker activity, Amstar could not lead the industry to a stabilized market.

The more drastic measures contemplated by Amstar's five-year plan were carried out on April 1, 1974 when fifteen of the general sugar brokers, including the two plaintiffs in this action, were terminated. But as Amstar recognized when the plan was written, it could not take this step unless some of the general brokers fell in line and agreed to continue selling Amstar products and to give up their representation of other refiners. (A28) Fox and Waller, two of the general brokers who so agreed, testified regarding their discussions with Amstar immediately prior to the terminations. The District Court's decision denying judgment n.o.v. summarized their participation in the implementation of the plan:

> "Fox and Waller . . . were induced by Amstar to give up representing competing refiners, and they agreed to do so, knowing the nature of Amstar's dissatisfaction with the general sugar brokers and what would be expected of them as direct sugar brokers. When Fox and Waller fell in line, they provided the experience Amstar required and thus materially aided and abetted the overall plan." (A28)

The record provided the District Court with ample support for these factual findings. It is clear, for example, that Amstar had supported the position that the general brokers had to understand the effect of their activities "and what it does to the stability of a market," (237e) and had earlier attempted to dissuade them from offering discount sugar of other refiners by imposing a penalty of three cents per hundredweight when sales were placed below list price in order to meet that competition. Fox and Waller had also participated in earlier phases of the plan. (1807a-1813a; 87e; 121e-122e)

The activities of the Bruce Chaney Co., another broker converted on April 1, 1974, indicate how important the general brokers who fell in line and agreed with Amstar not to sell competing sugar products were to Amstar's plan. An internal memorandum written to an Amstar vice-president eleven days after the terminations stated:

> "The March 22 announcement could have, but did not dramatically affect Territory 5. The Bruce Chaney Co., after a severe case of prickly heat, decided to stay with Amstar; therefore, simultaneously eliminating an intelligent prostitute from the 100 lb. bag market, and securing continuity of bulk shipments into the Cleveland-Akron area." (52e)

Chaney's "severe case of prickly heat" during the conversion process demonstrates that this general broker was not easily converted to a direct broker and, taken with the reference to Chaney's having "decided to stay with Amstar," shows the consensual nature of Chaney's action. Amstar's elimination of "an intelligent prostitute from the 100 lb. bag market" shows its market-stabilizing objective. And the reference to Amstar's "securing continuity of bulk shipments into the Cleveland-Akron area" indicates

how important it was in the execution of Amstar's plan to stabilize the market by eliminating general brokers (who are clearly the persons referred to as the "prostitutes"), that Amstar continue relationships with, and have the cooperation of, certain of the former general brokers.

Proceedings Below

The District Court

During the trial of this action the jury heard the testimony of thirteen executives of sugar refiners, nine executives of sugar brokerage firms, eleven purchasing agents of large food corporations and ten economic and accounting experts including Alfred Eichner, a professor of economics associated with Columbia University and the State University of New York. Professor Eichner testified that the refined sugar industry is an oligopoly, but that distribution through general brokers constituted a "middle man network" which prevented Amstar from charging oligopoly prices and that the effect of the elimination of distribution through them by Amstar was to reduce discounting from list price.* (1278a-1286a)

The jury also heard the testimony of a Reynolds Securities, Inc. executive who specialized in sugar industry securities and was declared to have been adopted as an expert by both sides. (237a) He testified that on April 1, 1974, the day the brokers were terminated, Reynolds issued to the securities trade, over his signature, an "In-

* Professor Eichner was called by plaintiffs but said he "would appear as a witness if [he] were not to be associated with any particular party in the case", and refused to accept any reimbursement for expenses. (1262a)

dustry Comment". The comment referred to the terminations as a "drastic step" which would do away with a "structure" which had "evolve[d] in a way that their [the general brokers'] operation, competing among each other, almost inevitably encouraged the lowest possible price to the buyer . . . ." He concluded his comment with reference to changes "for the future" which would increase profits in a "business which, in the past, appeared subject to unnecessary discounting." (32e)

There was considerable evidence regarding the effect on prices of Amstar's termination of general brokers, including an exhibit showing that the profit per hundred pounds of sugar went from $.32 in March 1974 to $2.12 in April 1974, the month following the terminations. (225e)

The trial judge fully instructed the jury regarding unlawful purpose and effect under the rule of reason, and directed them to consider the good business purposes which Amstar had claimed. (1944a, 1949a) With respect to the necessary element of Amstar's combination with other persons—the subject of this petition—the court instructed the jury that in order to find for the plaintiffs it must find "joint agreement as distinguished from individual action." (1944a) He charged that, for the plaintiffs to prevail, the brokers which plaintiffs claimed had made such joint agreement with Amstar must have done so with "knowledge . . . that each was following or would follow a certain course of conduct for the purpose of . . . restricting competition and unreasonably restraining trade. . . ." (1943a-1944a)

The jury was instructed that, in considering the elements of plaintiffs' claim, including combination or con-

spiracy, it could consider all of the steps taken in carrying out Amstar's plan, *i.e.,* "the activities before and the activities after" the terminations. (1938a)

Although the jury found, by special verdict, that Amstar had not violated Section 2 of the Sherman Act, it answered "yes" to the following special verdict question:

> "Do you find, by a preponderance of the evidence, that Amstar's termination of general sugar brokers including [plaintiffs] was the result of a combination or conspiracy that resulted in an unreasonable restraint of trade and that the restraint directly damaged [plaintiffs]?" (1981a)

Trebling the damages of $150,000 found by the jury, the District Court entered judgment for plaintiffs and denied their application for injunctive relief. Amstar moved for judgment n.o.v. The District Court pointed out that in its motion:

> "Amstar does not appear to explicitly challenge the sufficiency of the evidence with respect to anti-competitive purpose or effect." (A19)

Amstar argued, however, that it should be granted judgment n.o.v. because no combination or conspiracy had been proven. (A26-A33) In an opinion reviewing the proof of the action taken by Amstar together with certain brokers whose cooperation the District Court found was necessary "in order for the plan to succeed" (A28,A34), the District Court denied the motion.

The Court of Appeals

The Court of Appeals reversed on the question of combination. Without any mention of Amstar's multi-phase five-year plan of which the terminations were a part, or of the steps taken to implement it—the basis upon which the case had been tried and principal subject of the District Court's opinion—the Court of Appeals considered the case as if in March 1974 Amstar "simply made" a decision to change its method of distribution.* It held that:

> "Amstar simply made a unilateral decision to change the method by which it markets its product . . . . There being no evidence that Amstar went beyond mere unilateral substitution of one method of distribution for another, we reverse the judgment below on the § 1 claim and dismiss the complaint." (A14)

Distinguishing *Albrecht v. Herald Co.,* 390 U.S. 145 (1968), the Court of Appeals held that there could be no combination with the distributors whose cooperation enabled Amstar to go forward with its plan, because it was not Amstar's purpose to "coerce" those who remained (or those who had been terminated and might be reinstated) into engaging in resale price practices or any

* Although the Court of Appeals reviewed the authorities holding that for legitimate business reasons a manufacturer may unilaterally change its method of selling its goods and agree with a new distributor "to transfer patronage to him", as was the case in *Bowen v. New York News, Inc.,* 522 F.2d 1242, 1254 (2d Cir. 1975) *cert. denied,* 425 U.S. 936 (1976) (A8), that was not at issue. At no point in this litigation have plaintiffs taken the position that a manufacturer cannot lawfully change its system of distribution and terminate some or all of its distributors so long as it is not motivated by a purpose to restrain trade and does not enlist the cooperation of others whose assistance is required and who act with knowledge of the anticompetitive goal.

other anticompetitive activity.* The Court of Appeals held:

> "The *Albrecht* finding of an unlawful combination has been read *in this circuit* to apply only where there is evidence of knowing and active participation by a dealer and his manufacturer in a scheme *to coerce compliance* with anticompetitive activity such as resale price maintenance. *Bowen v. New York News, Inc., supra,* 522 F.2d at 1254; *Modern Home Institute, Inc. v. Hartford Accident & Indemnity Co., supra,* 513 F.2d at 113-14. See also *Knutson v. Daily*

* Although its finding of insufficient proof of combination made it unnecessary for the Court of Appeals to review the District Court's holding of unlawful purpose and effect, the Court of Appeals did advert to the market impact of the brokers' activities in its prefatory description of their function:

> "Their [the general brokers'] conduct, moreover, often had the effect of reducing the price of Amstar sugar and Amstar's profit margin.[2] (Footnote 2: It is evident that this 'customer orientation' was the result of two factors. First, it was a function of the peculiar market position occupied by the general sugar brokers in simultaneously representing a number of refiners. This allowed the general broker to acquire detailed market information as to the supplies and list prices of each of the sugar refiners. The brokers were not timid about using this information for the benefit of their customers. Second, the fact that the brokers were compensated upon the volume of sugar they arranged for Amstar to sell rather than upon the price of the sale or the profit margin realized by Amstar further added to their customer bent. Their only interest was to sell as much sugar in a given period as possible, even if this meant *conducting themselves in such a fashion as to require their principals to lower their initial quotations to a customer.*)" (A5 & n.2, emphasis added)

The court said the general sugar brokers "at times acted more nearly as purchasing agents for Amstar's customers." (A5) Amstar made that contention at the trial. In a special verdict, which the Court of Appeals apparently overlooked, the jury expressly found that the general brokers had *not* conducted themselves that way. (1983a) The effects described by the Court of Appeals were the result of competition. (116a)

Review, Inc., supra, 548 F.2d at 804-05; *Tamaron Distributing Corp. v. Weiner,* 418 F.2d 137 (7th Cir. 1969).

In the case at bar, however, there is no claim that Amstar has engaged in any unlawful resale price fixing with any of its brokers. Nor is there any evidence that Amstar, alone or in concert with others, sought by its terminations *to coerce compliance* by plaintiffs or any other brokers with anti-competitive activity. On the contrary, the record indicates that Amstar simply made a unilateral decision to change the method by which it markets its product. Accordingly, *Albrecht* does not support the judgment of the district court." (A13-A14, emphasis added).

Reasons for Granting the Writ

I.

The Court of Appeals' Requirement of Proof of Coercion in Order to Prove a Section 1 Combination Conflicts with *Albrecht* and Other Decisions of this Court.

There is no question that the measures taken by Amstar resulted in a significant reduction of competition in the sugar industry. The only question decided by the Court of Appeals was whether Amstar had accomplished its objective alone or in combination with certain of its distributors.

Albrecht v. Herald Co., 390 U.S. 145 (1968) is the leading case on the sufficiency of the proof of combination where a distributor claims a manufacturer has combined with others in violation of Section 1 and has terminated him.*

Consistent with a line of authority beginning with *United States v. Schrader's Son, Inc.,* 252 U.S. 85 (1920), the Court in *Albrecht* looked to the evidence surrounding the termination to determine whether those who assisted the manufacturer in the distribution of its goods knew of the manufacturer's purpose to restrict competition and "materially aided in the accomplishment of respondent's plan." 390 U.S. at 150.

Albrecht, although applauded by some commentators, has been criticized by others, not because of any disagreement with its inquiry into the contextual facts to determine whether a combination has been proven, but because, those commentators say, it permits the combination element of Section 1 of the Sherman Act to be supplied by proof of the conduct of persons who are only inciden-

* In *Albrecht,* the defendant Herald Co. was dissatisfied with its distributor Albrecht's refusal to adhere to a maximum resale price policy. Because of Albrecht's violations of the Herald's policy, the Herald hired Milne, who simply acted as a salesman, and Kroner, who was to deliver the papers to the customers solicited by Milne. Milne and Kroner were aware of the Herald's purpose but neither shared its desire to accomplish that purpose. Milne sought only to earn a fee, while the interest of the new routeman, Kroner, was to have the Herald fail in its objective because only if the Herald's discipline of Albrecht failed would Kroner be kept on and continue to earn his fee. 390 U.S. at 150. This Court, referring to Milne's and Kroner's knowledge that they were acting to achieve the Herald's purpose, held that there was "a combination within the meaning of § 1 between respondent [the Herald], Milne, and Kroner." *Id.*

tally or marginally involved in the activities of the defendant.*

Before considering *Albrecht,* the Court of Appeals emphasized that none of the converted brokers actually sat down with Amstar and "took part in the [termination] decision or even had any knowledge of the decision prior to the terminations." (A10)**

Having determined that there was no express agreement, the Court of Appeals turned to the District Court's reliance on *Albrecht* to permit a finding of combination. The court reviewed the facts in *Albrecht* and adverted to the fact that the Herald's purpose in employing the new salesman and routeman (both found to be conspirators) was to coerce the plaintiff into respecting the Herald's resale price maintenance program.

* For the various views on the case, *see, e.g.,* Baker, *Combinations and Conspiracies—Is There a Difference?,* 14 Antitrust Bull. 71, 88-90 (1969); 37 U. Cin. L. Rev. 411, 412 (1969); P. Areeda, Antitrust Analysis 567 (1974); L. Sullivan, Antitrust §§ 139,140 (1977); Handler, *Through the Antitrust Looking Glass—Twenty-First Annual Antitrust Review,* 57 Calif. L. Rev. 182, 189-193 (1969); Handler, *Twenty-Fifth Annual Antitrust Review,* 73 Colum. L. Rev. 415, 451-452 (1973); Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions,* 75 Colum. L. Rev. 282, 290-291 (1975); 10 B.C. Indus. & Commercial L. Rev. 208-216 (1968-1969); Note, *The Developing Theory of Combination under Section 1 of the Sherman Act: Another Requiem for Colgate Albrecht v. Herald Co.,* 57 Calif. L. Rev. 262 (1969); *The Supreme Court, 1967 Term,* 82 Harv. L. Rev. 95, 254-260 (1968); An Interview with Hon. Donald F. Turner, 37 Antitrust Law J. 290, 300 (1967-1968).

** If "knowledge of the decision" is significant, it is the knowledge of the claimed conspirators, not the victims of the conspiracy. Although it was conceded that Fuchs and Prael did *(footnote continued)*

Making that fact dispositive, the Court of Appeals held that "in this circuit" *Albrecht* has been read to require a terminated distributor who claims rights under Section 1 of the Sherman Act to prove the manufacturer-defendant used the same method—coercion—as the Herald had employed in pursuing its anticompetitive objective. As the Second Circuit reads *Albrecht,* unless a manufacturer and the compliant distributors have acted to force others in line, the proof of combination fails. The evidence is insufficient if it shows that the manufacturer, faced with a plaintiff and other distributors, who it knew from years of experience could not be disciplined, was able to cut them off permanently because it could go forward in combination with other distributors who knew of its anticompetitive purpose, were willing to assist in achieving it, and had the ability to do so without having to coerce others to go along.

So limiting *Albrecht,* and finding no coercion, the Court of Appeals could reverse the District Court without considering whether there was such evidence. After de-

not know of Amstar's termination deliberations in March 1974, there was uncontradicted testimony from another of the general brokers (whom the Court of Appeals rejected as "candidates" for combination with Amstar (A10)) that some months before the April 1, 1974 termination an Amstar vice-president told him that unless he and the other general brokers "contribute[d] a better role in pricing in the market . . . your days are numbered." (1315a-1316a). And an Amstar document dated February 11, 1974, listed other of the brokers, similarly rejected by the Court of Appeals as such candidates. The list included Kenneth Fox and George Waller of St. Louis Food Sales, both of whom were called as witnesses by plaintiffs. The February 11 document stated that "These brokers *would be advised that they must decide* by April 1 whether they would represent us exclusively or not." (10e, emphasis added) Fox and Waller testified regarding negotiations with Amstar in March 1974 which resulted in their conversion to direct brokers. (1803a-1805a; 1823a-1827a)

scribing the function of the general brokers and Amstar's displeasure with the results of their activities, the Court of Appeals' analysis passes over the 1969-1974 period as follows:*

> "As a result, Amstar began to move away from the use of general sugar brokers. By 1969, only about fifteen general brokers were still employed by Amstar. Finally, on March 22, 1974, Amstar announced to all of its remaining general brokers that it would terminate use of their services on March 30." (A5)

By holding that the lack of proof of coercion was a fatal defect which made it unnecessary for it to consider the evidence of what had occurred between March 1969 and March 1974, all of which had been analyzed in detail in the District Court's opinion (A22-A26), the Second Circuit disregarded not only *Albrecht* but also a long history of decisions by this Court that, in determining whether a combination was formed between a manufacturer and its distributors, no one element of their joint activity—such as the use of coercion—is critical.

The *Albrecht* Court's reference to that history made it clear that a combination can arise through the use of coercion and without it as well. Citing *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960) the Court said:

* Except for references to the appointment of plaintiff Fuchs and Andorn, Bergida & Danks, Inc. as direct agents for grocery sugar in New York some time during that period and to the acceptance by 13 other brokers of termination payments in exchange for general releases. (A6-A7) The reference to Amstar's use, "by 1969, [of] only about fifteen general brokers" is incorrect; fifteen (including these plaintiffs) were terminated in 1974. Others (including Fox, Waller and Chaney) were converted at the time of the terminations. A number of others had earlier been the subject of the "selective terminations" described by the District Court. (A30 See also A24, A25)

> "On the undisputed facts recited by the Court of Appeals [the Herald's] conduct cannot be deemed wholly unilateral and beyond the reach of § 1 of the Sherman Act. That section covers combinations in addition to contracts and conspiracies, express or implied . . . Parke, Davis was found to have created a combination 'with the retailers and the wholesalers to maintain retail prices . . .' *Id.* at 45. The combination with retailers arose because their acquiescence in the suggested prices was secured *by threats of termination;* the combination with wholesalers arose *because they cooperated* in terminating price-cutting retailers." 390 U.S. at 149, emphasis added.

The cases discussed by Mr. Justice Brennan in the analysis in *Parke, Davis* of the growth of the law in this area—*United States v. Schrader's Son, Inc.*, 252 U.S. 95 (1920); *Frey & Son v. Cudahy Packing Co.*, 256 U.S. 208 (1921); *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922); and *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944)—are identical in their holdings that whether a manufacturer and certain of its distributors have combined for purposes of Section 1 is to be determined by "all the pertinent facts." 256 U.S. at 210.

Thus, *Schrader's* states that there is an unlawful combination when a manufacturer "enters into agreements—whether express or implied from a course of dealing or of other circumstances." 252 U.S. at 99. *Cudahy* endorsed the *Schrader's* standard for proof of a "combination or agreement." Finding that the Circuit Court erred in relying on the absence of an express agreement, the Court held:

> "[H]aving regard to the course of dealing and all the pertinent facts disclosed by the present record, we

think whether there existed an unlawful combination or agreement by the manufacturer and jobbers was a question for the jury to decide and that the Circuit Court of Appeals erred when it held otherwise." 256 U.S. at 210.

In *Bausch & Lomb,* the facts showing cooperation between the manufacturer and certain distributors were sufficient to support a finding of combination.

> "The wholesalers accepted Soft-Lite's offer of a plan of distribution by cooperating in prices, limitation of sales to and approval of retail licenses. That is sufficient . . . . Whether this conspiracy and combination was achieved by agreement or acquiescence of the wholesalers coupled with assistance in effectuating its purpose is immaterial." 321 U.S. at 723.

None of the cases analyzed in *Parke, Davis* suggests that coercion must be present for a combination between a manufacturer and its distributors to come within Section 1; the combinations or conspiracies found in *Schrader's, Cudahy* and *Bausch & Lomb* were in no way dependent upon the existence of coercion. In each of those cases, as in this case, the manufacturer found willing assistants and did not need to use coercion to get others to go along.

The Court said in *Albrecht*, 390 U.S. at 149, that its decision proceeded from the analysis contained in *Parke, Davis,* and considered the *quantum* of the circumstantial proof, not the propriety of proving a combination from all the contextual facts. The Eighth Circuit recently observed that in *Albrecht,* "the Supreme Court of the United States has liberalized the proof requirement in this regard by permitting the finding of an implicit conspiratorial agreement between parties, some of whom

have marginal involvement in or awareness of the overall scheme." *Morton Buildings of Nebraska, Inc. v. Morton Buildings, Inc.*, 531 F.2d 910, 917, n.9 (8th Cir. 1976) (dictum). As interpreted by the Eighth Circuit, *Albrecht* brought the law well beyond the point necessary to sustain the sufficiency of the evidence of combination in this case.

The odd result of the Court of Appeals' decision here is that *Albrecht,* which has been read by other circuit courts in the same way as it was read by the Eighth Circuit (see cases cited *infra* at 24-26) has now produced precisely the opposite result in the Second Circuit. Coercion has been added to all the pre-*Albrecht* combination requirements.

If the test of combination in Section 1 cases needs to be reexamined and the holding of *Albrecht* does require correction or restatement, the grant of certiorari in this case will afford Amstar an opportunity to so argue. If *Albrecht* was wrongly decided, and petitioners urge it was not, the problem should not be solved by the Second Circuit limiting the decision to its facts and requiring coercion to be shown in every actionable conspiracy to terminate a distributor where an express agreement is not claimed. Such a test would make the lawfulness of joint action turn only on the use of a particular technique in reaching an anticompetitive objective.

II.

The Court of Appeals' Requirement of Coercion for an *Albrecht* Combination Conflicts with the Decisions of Other Courts of Appeals.

As we have mentioned, far from adding to the plaintiff's traditional burden, *Albrecht* has been read in other circuits to have liberalized traditional conspiracy law in civil antitrust cases by requiring less conspirator involvement than the District Court had instructed the jury it must find in this case; and none of the other circuits has suggested that coercion must be part of the proof. *Friedman v. Thorofare Markets,* 587 F.2d 127 (3rd Cir. 1978); *Morton Buildings of Nebraska, Inc. v. Morton Buildings, Inc., supra,* 531 F.2d 910 (where employing the test quoted *supra* at 22-23, no combination was found); *Greenville Publishing Co., v. Daily Reflector, Inc.* 496 F.2d 391, 399 n.16 (4th Cir. 1974); *Blankenship v. The Hearst Corp.,* 519 F.2d 418, 428 (9th Cir. 1975); *Bushie v. Stenocord Corp.,* 460 F.2d 116, 119 (9th Cir. 1972); *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.,* 416 F.2d 71, 78 (9th Cir. 1969), *cert. denied,* 396 U.S. 1062 (1970). Although, of course, coercion may be an effective method in reaching an objective, and often is employed in an unlawful combination with distributors, the absence of coercion in these cases and in the decisions of this Court previously discussed demonstrates it is not a dispositive fact.

Pacific Coast Agricultural Export Ass'n. v. Sunkist Growers, Inc., 526 F.2d 1196 (9th Cir. 1975), *cert. denied,* 425 U.S. 959 (1976) is perhaps the closest case factually because there, as here, the combination claimed

was between the defendant and a broker who had been made an exclusive sales representative. No coercion was exerted by Sunkist and its exclusive broker. The other distributors were simply let go. The Ninth Circuit relied on the prior decisions of that court interpreting *Albrecht* —*Seagram, Bushie* and *Blankenship*—in finding the combination. Emphasizing that the existence of proscribed joint action between the manufacturer and the new exclusive distributor turned on whether the defendant's termination of the plaintiffs was motivated by anticompetitive objectives, the Court held that the termination violated Section 1. *Id.* at 1202-1203.

The Third Circuit has most recently applied *Albrecht* to a situation in which there was no coercion of anyone. *Friedman v. Thorofare Markets,* 587 F.2d 127 (1978). The Third Circuit's standards for the proof of a combination were precisely those employed by the District Court here which had required "anticompetitive purpose on the part of the defendant and a material aiding and abetting of that purpose by third parties having knowledge of the purpose. . . ." (A28). The Third Circuit held:

> "Although there is no direct evidence that Union shared Thorofare's motive of eliminating a competitor, Union cannot automatically be absolved from liability on this ground, particularly since it might well have known of Thorofare's purpose and 'materially aided in the accomplishment of [its] plan.' *See Albrecht v. Herald Co. . . .*" 587 F.2d at 142, 143 n.64.

Until its decision in this case, the law in the Second Circuit had been in accord with the other circuits. In *Jacobson & Co., Inc. v. Armstrong Cork Co.,* 548 F.2d 438 (1977), the district court had granted a preliminary

injunction to a terminated distributor where there was no evidence of coercive activities undertaken by the manufacturer, just the manufacturer's termination and abandonment of a distributor selling outside its territory and its continued distribution through those who willingly went along and would not upset the market. 417 F. Supp. 564 at 569. The Second Circuit affirmed. It pointed out that Armstrong's argument that its conduct was "at most . . . unilateral action" failed because:

> "There was, however, sufficient evidence to show that the termination may have been part of an overall scheme to maintain a system of territorial allocations, which would be enough to bring Armstrong within the ambit of Section 1. See *Albrecht v. Herald Co.,* 390 U.S. 145, 150 n.6. . . ." 548 F.2d at 444, n.9

III.

The Court of Appeals Has Erroneously Decided an Important Question of Federal Law.

The Court of Appeals' decision that "there was insufficient evidence of a combination or conspiracy" (A1) will be read together with the findings of fact set forth in the District Court's opinion—which were not challenged by the Court of Appeals' decision—of the steps which Amstar took with those brokers who "aided and abetted" it in carrying out its plan. When read in light of those facts, the decision will open up for debate principles which have not been questioned since this Court's decision in *Parke, Davis.* The Second Circuit's opinion is bound to generate

new contentions in the many antitrust actions now pending in the federal courts.

More important than the confusion which the opinion is likely to cause in pending litigation, we submit, is the effect it will have in the counselling of market strategies and consequently on business conduct which may never receive judicial examination. Under the rule stated in the Second Circuit's opinion, the reach of Section 1 depends on the technique or methodology used in achieving an anticompetitive result rather than on the impact of the joint action on the market. The decision is an invitation to dominant sellers at the top of distributional networks who may desire to stabilize the markets in which their goods are sold to devise ways of employing "carrots" (in this case "plums"), rather than "sticks" to get the adherence of the distributors who must cooperate if anticompetitive objectives are to be reached.

Conclusion

We ask this Court to grant a writ of certiorari and, upon its grant, to reinstate the judgment of the District Court entered upon the verdict of a jury which had before it ample evidence of Amstar's purpose and of the effect of the actions it took with distributors who knew Amstar's purpose to stabilize, and raise prices in, the country's sugar markets.

Respectfully submitted,

H. RICHARD WACHTEL
LEBOEUF, LAMB, LEIBY & MACRAE
Attorneys for Petitioners,
Fuchs Sugars & Syrups, Inc.
and Francis J. Prael
Office and P.O. Address
140 Broadway
New York, New York 10005
(212) 269-1100

Of Counsel:

GRANT S. LEWIS
JOHN S. KINZEY, JR.
WILLIAM G. PRIMPS

Dated August 29, 1979

APPENDIX

Court of Appeals' Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Cal. Nos. 164, 165—August Term, 1978.

(Argued January 18, 1979 Decided June 8, 1979.)

Docket Nos. 78-7188, 78-7222

FUCHS SUGARS & SYRUPS, INC. and FRANCIS J. PRAEL, doing business as LEWIS & CO.,

Plaintiffs-Appellees-Cross-Appellants,

—against—

AMSTAR CORPORATION,

Defendant-Appellant-Cross-Appellee.

Before:

LUMBARD, MOORE and MANSFIELD,

Circuit Judges.

Appeal from a judgment for plaintiff based upon a jury finding that defendant had conspired to restrain trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The Court of Appeals held that there was insufficient evidence of a combination or conspiracy under Section 1 and accordingly reversed.

H. Richard Wachtel, Esq., New York, N.Y. (LeBoeuf, Lamb, Leiby & MacRae, New York, N.Y., Grant S. Lewis, Esq., William G. Primps, Esq., John S. Kinzey, Jr., Esq., Gilbert A. Samberg, Esq., of Counsel), *for plaintiffs-appellees-cross-appellants.*

William E. Willis, Esq., New York, N.Y. (Sullivan & Cromwell, New York, N.Y., James H. Carter, Esq., William M. Dallas, Jr., Esq., Steven E. Harbour, Esq.; Amstar Corporation, Law Department, John C. Reynolds, Esq., Frederick M. Porter, Esq., of Counsel), *for defendant-appellant-cross-appellee.*

Lumbard, *Circuit Judge:*

Two sugar brokers, Fuchs Sugars & Syrups, Inc. ("Fuchs") and Francis J. Prael ("Prael") brought this action in the Southern District of New York against the Amstar Sugar Corporation ("Amstar"), a large sugar refiner, alleging antitrust violations under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. The suit was triggered by Amstar's decision in 1974 to terminate the services of Fuchs and Prael as its general sugar brokers.

At the conclusion of a three-week trial before Judge Ward, the jury found that Amstar had conspired to restrain trade in violation of § 1 of the act. With respect to § 2, the jury found that Amstar had not attempted to monopolize the sugar market. The jury awarded damages totaling $150,000 before trebling by the Court. The Court denied plaintiffs' request for an injunction compelling Amstar to reinstate them as its general sugar brokers.

After the verdict, Amstar moved for judgment n.o.v. on the § 1 claim on the ground that there was no evidence of a combination or conspiracy. Judge Ward denied the motion in an opinion reported at 477 F.Supp. 867 (1978). Amstar now appeals from the judgment entered on the verdict. Plaintiffs have cross-appealed the denial of their motion for injunctive relief.[1]

On appeal, Amstar argues that even if a corporation can conspire with its own agents in violation of § 1, plaintiffs introduced insufficient evidence to support a jury finding that there was such a conspiracy. We agree and therefore must reverse the judgment and dismiss the complaint. The record before us shows no more than a unilateral decision by Amstar to substitute one distribution system for another. It does not show a conspiracy with anyone, as the following recital of the facts discloses.

Large food manufacturers often distribute their product through a network of geographically dispersed commission agents called brokers, who normally represent several manufacturers at a time. Reliance on these brokers avoids the greater expense of employing full-time salaried sales personnel in each location where the product is sold.

These food brokers act as the manufacturers' agents in negotiations with wholesalers. As agents, the brokers do not purchase or take possession of the manufacturers' goods, bear any of the financial risk for these goods, or possess any discretion as to the pricing of the goods.

1 The complaint, insofar as § 2 is concerned, alleged that in terminating its general sugar brokers Amstar was attempting to monopolize the sugar industry. Despite the large market share enjoyed by Amstar and its apparent price leadership in the field the jury found no attempt to monopolize the market. Plaintiffs chose not to appeal from that part of the judgment.

Rather, their function is simply to bring a buyer and seller together in the hope of initiating a sale at a price and on terms agreeable to both.

Sugar refiners employ a network of brokers of the foregoing type, known as sugar brokers, to market their product to the wholesalers. These brokers are either direct or general brokers. The general broker acts simultaneously as an agent for more than one sugar refiner while the direct broker represents only one such refiner.

Amstar is the largest refiner of sugar in the United States, selling its product to three classes of customers: industrial purchasers, grocery chains, and institutional purchasers. Until it reorganized its distribution process in March of 1974, its marketing procedures included the use of general sugar brokers, direct sugar brokers and its own sales force.

For many years, the appellees, Fuchs and Prael, acted as general sugar brokers for Amstar from their principal offices in the New York area. In their capacity as Amstar sales agents, however, their authority was extremely limited. They were permitted only to quote to potential customers sugar prices which were fixed by Amstar; they possessed no pricing authority themselves. Any orders placed by customers with the brokers were subject to final approval by Amstar. Once approval was obtained, the sugar would then be shipped by Amstar directly to the customer and Amstar would bill the customer. The brokers neither took possession of nor title to the sugar and were compensated only by Amstar, on a commission basis, for their services in initiating the sale.

Although acting as sales agents for Amstar, Fuchs and Prael, together with Amstar's other general sugar brokers, engaged in certain practices on behalf of Amstar's

customers which at times affected the price paid for Amstar sugar. This conduct included: making recommendations to customers regarding the position (i.e., the quantity, price and terms for sugar) they should take in the market; shopping among the various sugar refiners for the best price for sugar buyers; obtaining from Amstar special prices and terms for certain customers; and giving customers information concerning the prices and terms being offered by Amstar to other customers. In short, while the general brokers were, in principle, agents of Amstar, they at times acted more nearly as purchasing agents for Amstar's customers. Their conduct, moreover, often had the effect of reducing the price of Amstar sugar and Amstar's profit margin.[2]

As a result, Amstar began to move away from the use of general sugar brokers. By 1969, only about fifteen general brokers were still employed by Amstar. Finally, on March 22, 1974, Amstar announced to all of its remaining general brokers that it would terminate use of their services on March 30. Thereafter, some of the general brokers were offered positions as direct brokers from Amstar. While some rejected the offer, two general brokers, Kenneth Fox and George Waller, agreed to

2 It is evident that this "customer orientation" was the result of two factors. First, it was a function of the peculiar market position occupied by the general sugar brokers in simultaneously representing a number of refiners. This allowed the general broker to acquire detailed market information as to the supplies and list prices of each of the sugar refiners. The brokers were not timid about using this information for the benefit of their customers. Second, the fact that the brokers were compensated upon the volume of sugar they arranged for Amstar to sell rather than upon the price of the sale or the profit margin realized by Amstar further added to their customer bent. Their only interest was to sell as much sugar in a given period as possible, even if this meant conducting themselves in such a fashion as to require their principals to lower their initial quotations to a customer.

forego representation of other sugar refiners to act as sugar brokers exclusively for Amstar.[3] Amstar offered the terminated brokers a voluntary termination payment. The payments were made in exchange for general releases executed by the brokers. Thirteen brokers accepted the payments and executed releases. Only the plaintiffs, Fuchs and Prael, refused the payments and commenced this suit.

Plaintiffs charge that Amstar's decision to terminate its use of general brokers and to negotiate the sale of its product exclusively through direct brokers or its own sales personnel was the product of a conspiracy in restraint of trade. They charge that the terminations were part of a plan by Amstar to deprive its customers of the market information and competitive assistance supplied by the general brokers. This competitive assistance, plaintiffs argue, often enabled Amstar customers to purchase sugar at a price below that which Amstar had originally quoted. Plaintiffs conclude that the terminations were anti-competitive and in restraint of trade. In addition, plaintiffs contend that to implement successfully its new distribution system Amstar conspired with its own general and/or direct brokers. They cite as evidence of conspiracy that after the general brokers were notified of the terminations, two of them agreed to become direct brokers for Amstar and 13 former Amstar brokers acquiesced to their terminations by accepting the voluntary termination payments. Plaintiffs also focus on the fact that from 1972 to 1974, Fuchs agreed to act as one of two direct brokers on grocery sales in New York with the firm of Andorn, Bergida & Danks, Inc. ("ABD") for Amstar. After Fuchs' termination, however, ABD continued to represent

3 None of the general brokers terminated by Amstar in March 1974 went out of business, and all continued to represent Amstar's competitors. Indeed, at the time of trial Fuchs represented 22 other suppliers and Prael represented 13.

Amstar as its only broker in New York, thus aiding Amstar in implementing its new distribution system.

Section 1 of the Sherman Act prohibits every contract, combination, or conspiracy in restraint of trade. Since a § 1 conspiracy, like other proscribed conspiracies, requires a plurality of actors, the contract, combination or conspiracy must reflect an agreement between independent businessmen. *Simpson v. Union Oil Co.*, 377 U.S. 13, 20 (1964); *Bowen v. New York News, Inc.*, 522 F.2d 1242 (2d Cir. 1975) *cert. denied*, 425 U.S. 936 (1976); *Modern Home Institute Inc. v. Hartford Accident & Indemnity Co.*, 513 F.2d 102, 108-09 (2d Cir. 1975).

The Sherman Act does not condemn every business decision as a § 1 conspiracy merely because it is the product of an agreement between two persons or entities legally capable of conspiring. A manufacturer may announce the terms under which he will market his product and deal only with those customers who agree to abide by the terms. *United States v. Colgate & Co.*, 250 U.S. 300 (1919). Similarly, a manufacturer is free to choose the type of mechanism through which he will distribute his goods and can designate certain sales representatives as his exclusive agents. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 376 (1967), overruled in part on the grounds, *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977); *Bowen v. New York News, Inc., supra*, 522 F.2d at 1254. *See also Knutson v. Daily Review, Inc.*, 548 F.2d 795, 804-05 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977). We have held that:

> "[w]here a manufacturer simply decides on his own to substitute one dealer for another, and cuts off the former dealer, his decision to sell exclusively to a new dealer does not amount to an antitrust

> 'conspiracy' with the latter, [citations omitted], even though the manufacturer has agreed with the new dealer to transfer patronage to him and to terminate sales to the former dealer." *Bowen v. New York News, Inc., supra,* 522 F.2d at 1254.

This is equally true where a manufacturer abandons his entire distribution system in favor of another system, *Knutson v. Daily Review, Inc., supra,* 548 F.2d at 805, whether it be to improve distribution, maximize profits or for some other legitimate competitive reason. *Oreck Corp. v. Whirlpool Corp.,* 579 F.2d 126 (2d Cir. 1978) (en banc) (Mansfield, J. dissenting on other grounds).

A § 1 conspiracy will arise, however, where in addition to substituting one distribution system for another the manufacturer attempts to exact some collateral anti-competitive advantage. *Bowen v. New York News, Inc., supra,* 522 F.2d at 1254. *See also Knutson v. Daily Review, Inc., supra,* 548 F.2d at 804-05. For example, in *Bowen* the defendant, the New York News, announced that it would no longer market its paper through independent dealers who in addition to distributing the defendant's paper were selling those of its competitors. Instead, the News decided to franchise certain dealers to whom it would sell exclusively. After announcing its decision the News offered its independent dealers the opportunity to become exclusive dealers. Some of the dealers agreed to become exclusive dealers while others rejected the offer and remained independent dealers. We held that this was simply a change by the News in its distribution system and, without more, would not constitute an antitrust conspiracy. As it developed, however, the independents were still able to buy copies of the News from independent sources and continued to service their customers. The

News, however, in cooperation with some of its franchised dealers, attempted to cut off the independents' source of supply, thus eliminating them as competitors with its own franchised dealers. It was this concerted conduct which we held constituted a § 1 conspiracy.

Appellant's first attack upon the judgment below is that Amstar was incapable, as a matter of law, of conspiring with its own sugar brokers in restraint of trade.[4] Appellant argues that Amstar's sugar brokers were an instrumentality of the Amstar corporation and consequently were not independent entities with whom Amstar could conspire under § 1. Appellant points out that there is no evidence that Amstar did anything more than merely reorganize its distribution system and, as we announced in *Bowen,* this alone will not support a § 1 conspiracy. *Bowen v. New York News, Inc., supra,* 522 F.2d at 1254; *Oreck Corp. v. Whirlpool Corp.,* 579 F.2d at 126, 139 (2d Cir. 1978) (en banc) (Mansfield, J. dissenting on other grounds.)[5]

---

4 Although the Court below stated that Amstar did not contend that the general brokers (and presumably the direct brokers) were so lacking in independence that any conspiracy with them would have been intra-corporate (447 F.Supp. at 874 n. 10), the record indicates the contrary. Indeed, the essence of Amstar's argument below, and again on appeal to this Court, is that the general and/or direct brokers were merely a part of the Amstar entity rather than a separate step in the distribution chain. Amstar contends that the brokers were economically indistinguishable from Amstar and legally incapable of conspiring with Amstar in violation of § 1.

5 Whether the two actors constitute distinct economic entites for purposes of the Sherman Act is determined by the economic realities of their relationship. *Knutson v. Daily Review, Inc., supra,* 548 F.2d at 801-02. In the context of the principal/agent relationship this analysis requires consideration of a number of elements which include: whether the agent performs a function on behalf of his principal other than securing an offer from a buyer for the principal's product; the degree to which the agent is authorized to exercise his discretion concerning the price and

We hold that the evidence only supports the conclusion that Amstar acted unilaterally in arriving at its decision to change its distribution system and eliminate use of its general brokers. Indeed, the record is replete with evidence that the termination decision was a closely guarded secret within the Amstar corporation and in fact was the subject of elaborate security precautions. These included the designation of a single typist to prepare the paperwork necessary to notify the brokers of the terminations. Moreover, insofar as those co-conspirators proposed by plaintiffs are concerned, there was no evidence that any of these candidates either took part in the decision or even had any knowledge of the decision prior to the terminations. In fact, the only evidence in the record is to the contrary. Both of the former general brokers who later became direct brokers for Amstar testified that they took no part in the termination decision.

Likewise, following the terminations, the record is devoid of any evidence that Amstar conspired with

---

terms under which the principal's product is to be sold; and finally whether use of the agent constitutes a separate step in the vertical distribution of the principal's product.

Review of these elements in the case at bar indicates that Amstar's sugar brokers possessed none of the earmarks of an economic entity separate and distinct from Amstar. So far as their relations with Amstar were concerned, it is clear that the sugar broker acted solely as the conduit through which Amstar would negotiate the initial distribution of its sugar. Thus, the brokers never purchased sugar from Amstar or competed with Amstar in the distribution or sale of sugar. Nor did Amstar ever hold the brokers out as its competitors. Their sole function was to supply Amstar with potential customers. The terms and price of a resultant sale were exclusively determined by Amstar. Accordingly, since the purchase of Amstar sugar through a broker was in all respects a purchase directly from Amstar, *see, e.g., Sugar Industry Antitrust Litigation,* 73 F.R.D. 322 n. 16 (E.D. Pa. 1977), rather than representing a separate and independent step in the distribution process, the sugar broker was merely an agent.

anyone in restraint of trade. We find no merit in plaintiffs' argument that it was evidence of a § 1 conspiracy that after the terminations some former brokers agreed to become direct brokers for Amstar and others, by accepting the voluntary termination payments which were made to alleviate some of the loss and dislocation attributable to the brevity of the notice, agreed to end their relationship with Amstar. Indeed, if it is not an antitrust violation for a manufacturer to change his distribution system, then it can hardly be evidence of an illegal conspiracy that the manufacturer seeks merely to secure the personnel to man this new system. *Bowen v. New York News, Inc., supra,* 522 F.2d at 1254. Accordingly, Amstar's offering its former agents the opportunity to become part of its new distribution system and the decision of two agents to accept the opportunity was not evidence of a § 1 conspiracy. Similarly, the fact that the majority of its former agents decided to reject the opportunity and continue as general brokers for other refiners does not evidence a conspiracy.

The plaintiffs argue that in view of the Supreme Court's holding in *Albrecht v. Herald Co.,* 390 U.S. 145 (1968), the jury had sufficient evidence from which it could infer that Amstar's goal in terminating its general brokers was anti-competitive and that the conduct of its general and/or direct brokers materially aided and abetted its accomplishment, thus permitting a finding that there was an illegal conspiracy. The trial court in submitting the § 1 claim to the jury and again in denying Amstar's motion for judgment n.o.v., adopted the plaintiffs' reasoning.[6] These rulings were erroneous.

---

6 ". . . so long as the jury in the instant case found an anti-competitive purpose, which they could have, they also could have found that Amstar combined with Kenneth L. Fox and

In *Albrecht* the plaintiff was an independent newspaper carrier who purchased newspapers wholesale from the defendant, the Globe, and thereafter sold them at retail. The parties were operating pursuant to an exclusive territory arrangement which provided, in pertinent part, that if a carrier exceeded the maximum retail price advertised by defendant, his exclusive territory would be lost. In violation of this agreement the plaintiff began to sell its papers at a price above the maximum set by the defendant. Thereafter, defendant engaged the Milne Circulation Sales Corp. ("Milne") to solicit customers from within plaintiff's territory for delivery at defendant's minimum price. Eventually those customers wrested by Milne from within the plaintiff's territory, numbering about 300, were turned over to another independent carrier named Kroner. The Globe employed Kroner under the same minimum price agreement it had imposed upon the plaintiff.

George David Waller in pursuit of that purpose. Amstar knew that in order for its plan to succeed it would need to hire additional people to serve as either direct brokers or Amstar sales people. There was evidence that it expected at least one of these additional people to 'fall out' of the ranks of the terminated general brokers. Fox and Waller did not merely 'fall out', however. They were induced by Amstar to give up representing competing refiners, and they agreed to do so, knowing the nature of Amstar's dissatisfaction with the general sugar brokers and what would be expected of them as direct sugar brokers. When Fox and Waller fell in line, they provided the experience Amstar required and thus materially aided and abetted the overall plan.

In addition, if the jury found an anti-competitive purpose in the elimination of general brokers with respect to New York City grocery accounts and the imposition of exclusive brokerage arrangements involving territorial and customer restrictions with Fuchs and ABD, under the *Albrecht* holding the jury could also have found that Amstar combined with ABD in order to reduce interbrand competition, stabilize prices, and eliminate general brokers servicing New York City grocery accounts . . ." Memorandum Opinion on motion for j.n.o.v., reported at 447 F. Supp. 869, 874 (1978).

Moreover, Kroner knew that he might have to relinquish the 300 customers to the plaintiff when and if plaintiff ever decided to abide by the minimum price standards set by the Globe.

Sometime later *Albrecht* was informed that his customers and exclusive territory would be returned if he agreed to abide by the retail price program. He refused and brought suit alleging a § 1 conspiracy. The Globe argued that its conduct in terminating the plaintiff was wholly unilateral and there could be no conspiracy as a matter of law. The Supreme Court disagreed.

In its decision, the Supreme Court held that a conspiracy arose between the Globe and Milne and/or Kroner which was calculated to coerce plaintiff's conformity with its program of retail price maintenance. Paramount in its decision was the fact that both Milne and Kroner knew of the Globe's scheme to enforce its program of retail price maintenance and that their conduct materially aided in the achievement of that objective. 390 U.S. at 150.

The *Albrecht* finding of an unlawful combination has been read in this circuit to apply only where there is evidence of knowing and active participation by a dealer and his manufacturer in a scheme to coerce compliance with anticompetitive activity such as resale price maintenance. *Bowen v. New York News, Inc., supra,* 522 F.2d at 1254; *Modern Home Institute, Inc. v. Hartford Accident & Indemnity Co., supra,* 513 F.2d at 113-14. *See also Knutson v. Daily Review Inc., supra,* 548 F.2d at 804-05; *Tamaron Distributing Corp. v. Weiner,* 418 F.2d 137 (7th Cir. 1969).

In the case at bar, however, there is no claim that Amstar has engaged in any unlawful resale price fixing with any of its brokers. Nor is there any evidence that Amstar, alone or in concert with others, sought by its

terminations to coerce compliance by plaintiffs or any other brokers with anti-competitive activity. On the contrary, the record indicates that Amstar simply made a unilateral decision to change the method by which it markets its product. Accordingly, *Albrecht* does not support the judgment of the district court.

There being no evidence that Amstar went beyond mere unilateral substitution of one method of distribution for another, we reverse the judgment below on the § 1 claim and dismiss the complaint.

Decision Denying Rehearing

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighteenth day of July, one thousand nine hundred and seventy-nine.

FUCHS SUGARS & SYRUPS INC. and FRANCIS J. PRAEL, doing business as LEWIS & COMPANY,

Plaintiffs-Appellees Cross-Appellants,

v.

AMSTAR CORPORATION,

Defendant-Appellant Cross-Appellee.

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the Plaintiffs-Appellees-Cross-Appellants, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ IRVING R. KAUFMAN,
Chief Judge.

District Court's Opinion

No. 74 Civ. 2954.

United States District Court,
S. D. New York.

March 21, 1978.

FUCHS SUGARS & SYRUPS, INC., and Francis J. Prael, doing business as Lewis & Company, Plaintiffs,

v.

AMSTAR CORPORATION, Defendant.

Le Boeuf, Lamb, Leiby & MacRae, New York City, for plaintiffs; H. Richard Wachtel, Grant S. Lewis, Michael R. W. Green, William G. Primps, New York City, of counsel.

Sullivan & Cromwell, New York City, for defendant; William E. Willis, James H. Carter, Jr., William M. Dallas, Jr., Steven E. Harbour, New York City, of counsel.

OPINION

WARD, District Judge.

At the end of a three-week trial involving 47 witnesses and hundreds of documents, a jury found that defendant Amstar Corporation ("Amstar") had violated § 1 of the Sherman Act, 15 U.S.C. § 1, and was liable to both plaintiffs, Fuchs Sugars & Syrups, Inc. ("Fuchs") and Francis

J. Prael, doing business as Lewis & Company ("Prael"). Plaintiff's claims arose out of Amstar's April 1, 1974 termination of general sugar brokers, including Fuchs and Prael, and the events leading up to the termination.[1] The jury awarded Fuchs $80,000 and Prael $70,000; each award will be trebled under § 4 of the Clayton Act. 15 U.S.C. § 15. Amstar now moves pursuant to Rule 50(b), Fed.R. Civ.P., for judgment notwithstanding the verdict on the grounds that:

(1) As a matter of law, plaintiffs failed to prove a combination or conspiracy;

(2) Plaintiffs failed to prove any causal link between the purported violation and injury allegedly sustained by plaintiffs;

(3) As a matter of law, § 2(c) of the Robinson-Patman Act, 15 U.S.C. § 13(c), would be violated by plaintiffs' receipt of brokerage commissions, and as a matter of law, termination of brokerage commissions in order to avoid such violations is a complete defense to this purported Sherman Act § 1 violation.

Also pending is a fee application under 15 U.S.C. § 15 on behalf of counsel for plaintiffs.[2] For the reasons hereinafter stated, defendant's motion for judgment notwithstanding the verdict is denied, and decision on the

[1] The jury found Amstar not liable for attempted monopolization under § 2 of the Sherman Act, 15 U.S.C. § 2. In addition, the jury found against Amstar on the special question directed at its defense that the brokerage payments constituted violations of § 2(c) of the Robinson-Patman Act, 15 U.S.C. § 13(c). All other claims and counterclaims were withdrawn.

[2] The Court denied from the bench plaintiffs' oral motions: for judgment notwithstanding the verdict or a new trial on the § 2 claim; for a directed verdict on pre-judgment damages on the § 1 claim and a new trial on the post-judgment damages on the § 1 claim; and for an injunction compelling Amstar to reinstate Fuchs and Prael as general sugar brokers.

fee application is deferred until final determination of this case on appeal.

Amstar sells its sugar to three classes of customers: industrial purchasers such as candy, cookie and soda companies which purchase in bulk quantities approximately 75% to 80% of the refined sugar; grocery chains which purchase approximately 20% of the refined sugar; and institutional purchasers such as restaurants which purchase individual packets and other specialty items for consumption by their individual customers.

Prior to April 1, 1974, Amstar marketed its sugar to these customers in a number of ways, including use of general sugar brokers, direct sugar brokers and its own sales force. The sole distinction between general and direct sugar brokers is that general sugar brokers simultaneously represent more than one sugar refinery, while direct sugar brokers represent only one. Brokers do not take title to the sugar and do not buy and sell for their own accounts. Rather, they participate in the refiner's initial sale of sugar by functioning as go-betweens who bring together buyers and sellers at terms agreeable to both.[3] For this they are compensated by the refiner in the form of commissions for sales of the refiner's sugar. They are never compensated by the customers to whom the sugar is sold.

For one reason or another, Amstar was not pleased with the use of general sugar brokers as a means of distributing its product and so it decided to terminate them and replace them with direct brokers and Amstar sales people.[4] The questions for the jury were whether the

[3] Therefore, resale price maintenance was not an issue in this case.

[4] In order to do so, additional direct brokers and sales people were needed. For this purpose, Amstar induced, for example, Kenneth L. Fox and George David Waller, to become direct brokers in the

terminations were the product of an anti-competitive purpose, whether they had an anti-competitive effect, and, if so, whether the plaintiffs were injured as a direct result of the antitrust violation.

Amstar argued to the jury that the terminations were motivated by many good business reasons. The jury, however, chose to reject Amstar's argument and to accept plaintiffs' explanation of why the general brokers had been terminated. The theory of plaintiffs' case was that Amstar had a multi-phase five-year plan for the control and eventual elimination of general sugar brokers. The plan culminated in the April 1, 1974 termination of general sugar brokers and their replacement by direct brokers and Amstar's own sales people. According to plaintiffs, this constituted an unreasonable restraint of trade in violation of § 1 of the Sherman Act because it was motivated not by the business reasons Amstar proffered, but by an anti-competitive purpose to suppress particularly price, but also non-price, competition among various brokers.

Amstar did not object to this Court's instruction allowing the jury to consider, in relation to the purpose and effect of the broker terminations, Amstar's activities leading up to and following the April 1, 1974 terminations. Nor does it now contend that it was error to have so charged. Similarly, Amstar does not appear to explicitly challenge the sufficiency of the evidence with respect to anti-competitive purpose or effect.

The starting point of this Court's analysis must be recognition that the standard for granting judgment notwithstanding the verdict is most stringent.

Midwest. In addition, Joseph Gavin, formerly a Fuchs vice president, joined Amstar after Fuchs was terminated in April of 1974 and thereafter called on customers previously serviced by Fuchs.

Simply stated, it is whether the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable men could have reached. [Furthermore] the evidence must be viewed in the light most favorable to the party against whom the motion is made and he must be given the benefit of all reasonable inferences which may be drawn in his favor from that evidence.

Simblest v. Maynard, 427 F.2d 1, 4 (2d Cir. 1970); 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2524 (1971). Moreover, the evidence which must be considered is not all the evidence, but only the evidence favorable to the non-moving party and the uncontradicted, unimpeached evidence unfavorable to the non-moving party, *Bigelow v. Agway, Inc.,* 506 F.2d 551, 554 (2d Cir. 1974); *Horowitz v. Anker,* 437 F.Supp. 495, 503 (E.D.N.Y.1977), at least to the extent that the latter comes from disinterested witnesses. Wright & Miller, *supra* § 2529 at 572-73. But see *Simblest v. Maynard, supra* at 5 n.3. And "[s]ince grant of one of these motions deprives the party of a determination of the facts by a jury, they should be cautiously and sparingly granted." Wright & Miller, *supra* § 2524 at 542. With these principles in mind, the Court now turns to a review of the evidence to determine whether or not there was sufficient proof to justify the jury's accepting plaintiffs' theory.

FACTS

There was evidence in the record from which the jury could have found the following facts:

Sugar refining is, and was during the period in question, an oligopoly industry in which a limited number of smaller firms are dominated by Amstar, which markets Domino brand sugar. In the Northeastern United States, where plaintiffs transacted most of their business and which the parties agreed is a relevant submarket, over 80% of the refined sugar market, which the jury could have found to be the relevant product market, has been controlled by four firms. Of these four firms, Amstar has predominated, and had approximately 45% to 50% of the market share of sales of refined sugar in the Northeast in 1974.

Plaintiffs' contention that the elimination of the general sugar broker had an adverse effect on intrabrand and interbrand price and non-price competition turns on the peculiar status and function of the general broker. Based on the fact that brokers were compensated by the refiner, Amstar characterized general brokers as merely its agents. In doing so, however, it ignored the fact that inherent in the concept of simultaneous representation of multiple refiners is a disclosed conflict of interest between the "agents" and "principals". Thus, general sugar brokers by definition are independent of, and at times adverse to, the refiners they represent.

This inherent conflict between "agent" and multiple "principals" is intensified by the method of compensating brokers. Brokerage commissions generally are based upon volume, increasing in proportion to the volume of sugar sold and without regard to the sales price or profit margin to the refiner on the sale. Thus, the usual brokerage compensation scheme contains an incentive for the broker to sell as much sugar as possible, but no incentive for the broker to get the best possible price for

his refiner. In fact, if there is any built-in incentive it is for the broker to seek as low a price as the market will bear so as to attract customers away from other brokers and the refiner's own sales people and induce those customers to buy in greater quantity.[5] Thus, there is another inherent conflict—between the refiners' interest in maximized profits and the brokers' interest in maximized sales regardless of the refiners' profit. Furthermore, because other refiners generally compensate brokers in the same manner, the general broker concept contains no intrinsic incentive for the broker to sell the product of any particular principal.[6]

Because brokerage commissions were based on volume of sugar sold there was intensive competition among brokers for high volume sales. However, because brokers had no discretion in negotiating price or other terms and no authority to bind the refiner, and were limited to relaying price quotations and other information back and forth from buyer to seller, they had to develop other means of distinguishing themselves so as to compete for more sales. What ensued was broker competition to provide additional services to sugar purchasers, such as distributing free price forecast sheets and other data on the market, or obtaining free or cheaper delivery of sugar, or locating cheaper, or "distress", sources of sugar or introducing "private label" brand sugar.[7] Most importantly, brokers often competed by "shopping" for the lowest price among the refiners they represented. For example, brokers would sometimes inform a small volume purchaser of the price quote that had been given to a larger volume purchaser and thereby force down the price the small purchaser would be willing to pay. Or the general broker, being privy to price quotes from other refiners, might tell Amstar or the prospective purchaser that Amstar's quote was higher than that of a rival refiner and then tell Amstar that it must meet the competitor's quote if it hoped to make the sale. In these ways the general broker created interbrand competition among refiners which had a downward effect on price. At the same time, there was intrabrand price competition between the general sugar broker who sought the most competitive price and the Amstar salesman who generally sought to sell at the list price. The existence of such intrabrand competition is supported by the testimony of Edwin O. Holtz, formerly of Southern Biscuit Co., Howard Tiekert, formerly of Bond Baking Company, and Terrance Webster of Sunshine Biscuit, Inc., who testified to the effect that they generally got lower prices from general brokers than they got from Amstar people or from direct brokers.

[5] In 1972, Amstar attempted to alter these incentives by offering the general brokers a Bonus Incentive Plan under which those brokers who effected sales at list price received an additional 3 cents/cwt commission, while those who sold at off-list received the usual commission of 9½ cents/cwt.

[6] In practice, however, general brokers did develop loyalties, whether based on friendships with employees at a particular refinery, or on practicalities such as the desirability of offering or being in a position to offer the products of a dominant and diversified refiner such as Amstar.

Another avenue of competition brought about by the general sugar brokers was the introduction of private label sugar to the New York metropolitan area grocery market. It was through the efforts of general brokers, particularly Czarnikow-Rionda, that grocery stores were given the opportunity to buy the less expensive private label brands and offer these alongside and in competition with the name brands.

[7] Private label brands are owned by the sugar purchaser, such as a chain store, rather than by the refiner. An example of a private label brand is Ann Page, owned by A & P.

There was evidence in the record to suggest that it was Amstar's displeasure with these pro-competitive activities of the general brokers that led to their termination. For example, Amstar had communicated to various general brokers on a number of occasions its displeasure with the general brokers' depressing effect on prices. In addition, Amstar documents demonstrate a concern with the destabilizing effect the general brokers had on prices. Furthermore, William P. Cleaver, Vice President of Amstar and President of the American Sugar Division of Amstar, testified in a deposition that the only dissatisfaction with general sugar brokers he remembers having been expressed by Mr. Shanley, Executive Vice President of the American Sugar Division and formerly Vice President of Industrial Sales, had to do with the detrimental impact the general brokers were having on the price Amstar was receiving. Mr. Cleaver did not recall Mr. Shanley's ever having mentioned in connection with his dissatisfaction with the general brokers any of the business reasons which purportedly motivated Amstar to terminate the general brokers.

As further evidence of anti-competitive motive or purpose, there was the testimony of Ronald Blenderman, who had been Vice President of grocery products, from which the jury could have concluded that in order to protect the dominance of its name in the New York metropolitan grocery market, Amstar refused to sell its sugar for marketing under a private label. In addition, the jury could have found that in 1970 when Amstar terminated Czarnikow-Rionda, which at that time was Amstar's leading general sugar broker in the New York area, it did so because Czarnikow-Rionda was buying sugar from Puerto Rico, repackaging it and selling it to New York

grocery stores as private label at a price substantially less than Amstar's Domino brand. Furthermore, the jury could have found that Amstar intended to restrain competition with the Domino brand in the New York metropolitan grocery market when in 1970 it terminated all but three of the remaining general brokers in the New York grocery market, when in 1971 it induced Susan Goodman, formerly a leading sales person with Czarnikow-Rionda, to join Fuchs, and when in July 1972 it induced Fuchs to become an exclusive broker in the grocery market along with Andorn, Bergida & Danks ("ABD"), a food broker who became a direct broker for Amstar and replaced the 16 or so general brokers terminated by Amstar in 1970.

Amstar also argued to the jury that the terminations did not have an anti-competitive effect.[8] The jury, however, was entitled to draw the contrary inference from plaintiffs' documentary evidence that Amstar's market shares in the Northeast increased dramatically between the end of 1973 and the end of 1974, and that in 1975 Amstar reported the highest net income in its history despite the change-over in 1974 to the "lifo" method of reporting income. From this the jury could have inferred that the termination of all general brokers, not just plaintiffs, had an anti-competitive impact on the Northeast geographic submarket. In addition, the jury could have found, on the basis of the testimony of Dennis J. O'Connell, President of Ambrosia Chocolate Company and Hooton Chocolate Company, subsidiaries of W. R. Grace & Co., that subsequent to the terminations Amstar

[8] The Court notes that anti-competitive impact is judged in terms of a relevant market, not in terms of the adverse effects, if any, on the terminated brokers. *See Burdett Sound, Inc. v. Altec Corp.*, 515 F.2d 1245, 1248 (5th Cir. 1975); *Bushie v. Stenocord Corp.*, 460 F.2d 116, 119-20 (9th Cir. 1972).

began a practice of offering long term requirements contracts. He also testified that Amstar had attempted to force him to sign a one-year contract for almost a year's requirements of sugar. Joseph Torter of M. Polaner & Son, Inc., testified similarly. Under such contracts, the customer bears the risk of a rise in the price of raw sugar; Amstar assumes no risk. Mr. Shanley of Amstar testified that in the past, prior to the April 1, 1974 termination of the general sugar brokers, it had offered contracts with a minimum, maximum and specified period, and had offered 90 day coverage at a fixed price, but these had not been successful. Only in 1974, after the general brokers had been terminated, did Amstar succeed in convincing customers to tie up their requirements, to the possible detriment of competing refiners and customers.

In sum, the jury was entitled to conclude that the terminations and events leading up to and following the terminations had the anticompetitive purpose and effect of eliminating intrabrand price competition, depressing interbrand price competition and enhancing Amstar's dominant position in the market such that, for example, Amstar could now for the first time impose on its customers long term (six months or a year) requirements contracts under which the customer bore the risk of loss.

AMSTAR'S GROUNDS FOR JUDGMENT NOTWITHSTANDING THE VERDICT

I. *No Combination or Conspiracy*

It is hornbook law that a manufacturer, or in this case a refiner, has the right to unilaterally choose the

customers with whom he will deal. *United States v. Colgate & Co.*, 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992 (1919). However, the post-*Colgate* Supreme Court decisions, most notably, *United States v. Parke, Davis & Co.*, 362 U.S. 29, 80 S.Ct. 503, 4 L.Ed.2d 505 (1960), and *Albrecht v. Herald Co.*, 390 U.S. 145, 88 S.Ct. 869, 19 L.Ed.2d 998 (1968),[9] have read *Colgate* as narrowly as possible, leading many to question to what extent *Colgate* has any continued application. *See, e.g., Greene v. General Foods Corporation*, 517 F.2d 635, 651-55 (5th Cir. 1975), *cert. denied*, 424 U.S. 942, 96 S.Ct. 1409, 47 L.Ed.2d 348 (1976); *George W. Warner & Co. v. Black & Decker Mfg. Co.*, 277 F.2d 787, 790 (2d Cir. 1960) ("The Supreme Court [in *Parke, Davis*] has left a narrow [*Colgate*] channel through which a manufacturer may pass even though the facts would have to be of such Doric simplicity as to be somewhat rare in this day of complex business enterprise."); Handler, Through The Antitrust Looking Glass—Twenty-First Annual Antitrust Review, 57 *Calif.L.Rev.* 182, 187-91 (1969); Pitofsky, Is the Colgate Doctrine Dead?, 37 *Antitrust L.J. 772 (1968); The Supreme Court, 1967 Term, 82 Harv.L.Rev.* 63, 259 (1968). *See also Tamaron Distributing Corporation v. Weiner*, 418 F.2d 137 (7th Cir. 1969).

It was primarily on the basis of the facts, reasoning and broad dicta in *Albrecht, supra*, that this Court denied Amstar's motion for a directed verdict on the grounds of no combination or conspiracy. There, the Supreme Court found as a matter of law a combination between the defendant and two third parties, one of whom had a purpose entirely different from the defendant's purpose and the other of whom had a purpose antithetical to the

[9] *See also United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 378, 87 S.Ct. 1856, 18 L.Ed.2d 1249 (1967), *overruled in part on other grounds, Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977).

achievement of defendant's purpose. 390 U.S. at 149-50, 88 S.Ct. 869. By implication, what the Court held was required to establish such a combination was an anti-competitive purpose on the part of the defendant and a material aiding and abetting of that purpose by third parties having knowledge of the purpose, even though the third parties did not specifically intend to advance defendant's purpose.

Under this holding, so long as the jury in the instant case found an anti-competitive purpose, which they could have, they also could have found that Amstar combined with Kenneth L. Fox and George David Waller in pursuit of that purpose.[10] Amstar knew that in order for its plan to succeed it would need to hire additional people to serve as either direct brokers or Amstar sales people. There was evidence that it expected at least one of these additional people to "fall out" of the ranks of the terminated general brokers. Fox and Waller did not merely "fall out", however. They were induced by Amstar to give up representing competing refiners, and they agreed to do so, knowing the nature of Amstar's dissatisfaction with the general sugar brokers and what would be expected of them as direct sugar brokers. When Fox and Waller fell in line, they provided the experience Amstar required and thus materially aided and abetted the overall plan.

In addition, if the jury found an anticompetitive purpose in the elimination of general brokers with respect to

[10] Although whether the general brokers were "agents" is an issue with respect to the Robinson-Patman defense and is an implicit issue with respect to whether Amstar's attempts to control them was illegal under § 1 of the Sherman Act, it is not an issue with respect to whether or not they were capable of combining or conspiring. In other words, Amstar does not contend, and rightly, that the general brokers lacked sufficient independence such that any conspiracy with them would have been intra-corporate. *See Tamaron Distributing Corp. v. Weiner, supra,* 418 F.2d at 139.

New York City grocery accounts and the imposition of exclusive brokerage arrangements involving territorial and customer restrictions with Fuchs and ABD, under the *Albrecht* holding the jury could also have found that Amstar combined with ABD in order to reduce interbrand competition, stabilize prices, and eliminate general brokers servicing New York City grocery accounts.

Furthermore, in the famous footnote 6 in *Albrecht,* the Supreme Court outlined three other possible combinations:

> Under *Parke, Davis* [plaintiff] could have claimed a combination between [defendant] and himself, at least as of the day he unwillingly complied with [defendant's] advertised price. Likewise, he might successfully have claimed that [defendant] had combined with other carriers [plaintiff's competitors] because the firmly enforced price policy applied to all carriers, most of whom acquiesced in it. See *United States v. Arnold, Schwinn & Co.,* 388 U.S. 365, 372 [87 S.Ct. 1856, 1862, 18 L.Ed.2d 1249] (1967). . . .
>
> [Plaintiff's] amended complaint did allege a combination between [defendant] and [plaintiff's] customers. Because of our disposition of this case it is unnecessary to pass on this claim. It was not, however, a frivolous contention.

Under the first of these alternatives, both of which were approved in *Perma Life Mufflers, Inc. v. International Parts Corp.,* 392 U.S. 134, 142, 88 S.Ct. 1981, 20 L.Ed.2d 982 (1968), the jury could have found that Amstar combined with Fuchs who unwillingly complied with territorial and customer restrictions intended to suppress competition with the Domino brand in the New York City grocery market. Under the first and second alternatives posed in footnote 6 of *Albrecht,* the jury

might have found a combination with the thirteen terminated general brokers who agreed to accept the termination payments offered by Amstar.

Amstar urges, however, that there could be no unlawful combination or conspiracy unless the terminations were for the purpose of coercing future compliance with an illegal plan. The thrust of this argument is that since Amstar terminated all, rather than selective, general brokers and the terminations were final, there was no element of coercing future compliance. This argument has superficial appeal, but falters under closer scrutiny. First, even assuming that coercion is required in termination cases, contrary to Amstar's view of the case there was proof from which the jury could have inferred coercion. Over an extended period of time Amstar had used threats, selective terminations and territorial and customer restrictions to control general brokers. Then, simultaneously with announcing the termination of the remaining general brokers, but prior to the effective date of the terminations, Amstar offered Fox and Waller the position of direct brokers, but told them they must decide almost immediately. Fox and Waller knew that if they declined the offer they would be terminated entirely by Amstar. Under all these circumstances the jury could have found that Fox and Waller were coerced into acquiescing.

Second, Amstar's argument rests on the assumption that the terminations were merely a complete change-over in distribution. *If* all that were involved were a mere change-over in vertical distribution, with no anticompetitive purpose or effect, then Amstar is correct that there could not have been a combination or conspiracy in

illegal restraint of trade, for as the Second Circuit recently pronounced:

> Where a manufacturer *simply* decides on his own to substitute one dealer for another, and cuts off the former dealer, his decision to sell exclusively to a new dealer does not amount to an antitrust "conspiracy" with the latter, . . . even though the manufacturer has agreed with the new dealer to transfer patronage to him and to terminate sales to the former dealer.

Bowen v. New York News, Inc., 522 F.2d 1242, 1254 (2d Cir. 1975), *cert. denied*, 425 U.S. 936, 96 S.Ct. 1667, 48 L. Ed.2d 177 (1976) (emphasis added, citations omitted).[11] However

> [t]he critical inquiry in such "refusal to deal" cases is not whether there was a refusal to deal, or whether a refusal to deal was carried out by agreement with others, but rather whether the refusal to deal, manifested by a combination or conspiracy, is so anticompetitive, in purpose or effect, or both, as to be an unreasonable restraint of trade. *Hawaiian Oke,* [416 F.2d] supra, at 77-78; *Walker Distributing Co. v. Lucky Lager Brewing Co.,* 323 F.2d 1, 7 (9th Cir. 1963). This inquiry is primarily a factual one,

[11] Bowen relied on the often quoted language from Schwinn:

> [A manufacturer] may "franchise" certain dealers to whom, alone, he will sell his goods. Cf. *United States v. Colgate & Co.,* 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992 (1919). If the restraint stops at that point—*if* nothing more is involved than vertical "confinement" of the manufacturer's own sales of the merchandise to selected dealers, and if competitive products are readily available to others, the restriction, on these facts alone, would not violate the Sherman Act.

United States v. Arnold, Schwinn & Co., 388 U.S. 365, 376, 87 S.Ct. 1856, 18 L.Ed.2d 1249 (1967), *overruled in part on other grounds, Continental T.V., Inc. v. GTE Sylvania Inc.,* 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977) (emphasis added).

and its resolution often requires determination of motive or intent.

Alpha Distributing Co. of Calif., Inc. v. Jack Daniel Distillery, 454 F.2d 442, 452 (9th Cir. 1972), *cert. denied,* 419 U.S. 842, 95 S.Ct. 74, 42 L.Ed.2d 70 (1974).[12] The question, then, is whether reasonable men could only conclude that Amstar *simply* substituted direct brokers and its own sales force for the terminated general brokers, or *simply* vertically confined its product, as Amstar chooses to characterize the facts; or could reasonable men have concluded that the terminations were a means of effectuating a broader anti-competitive purpose and in fact had an anti-competitive effect. Viewing the evidence in the light most favorable to plaintiffs and giving plaintiffs the benefit of all reasonable inferences to be drawn therefrom, the Court concludes that the jury could reasonably have found an anti-competitive purpose and effect and therefore could have found an illegal combination or conspiracy.[13] Accordingly, the numerous cases cited by

[12] Amstar has contended that this is not a refusal to deal case at all, as it has never refused to sell sugar to plaintiffs but has merely refused to compensate them for arranging sales of Amstar's sugar. It would seem that a refusal to deal must be a function of the capacity in which the parties dealt prior to the termination. Therefore, inasmuch as Amstar had never dealt with plaintiffs as sugar purchasers, it is not significant that Amstar has never refused to sell sugar to plaintiffs.

[13] In connection with refusals to deal the courts have found to be "arrangements restraining trade" such practices as refusals to deal to eliminate price-cutting dealers, *United States v. Parke, Davis & Co.,* [362 U.S. 29, [80 S.Ct. 503, 4 L.Ed.2d 505] (1960)]; *Klor's v. Broadway-Hale Stores,* 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1958); to keep new competition out of a market, *Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co.,* 364 U.S. 656, 81 S.Ct. 365, 5

Amstar, which went off not on the absence of agreement but on the absence of anti-competitive motive or effect, are inapposite.[14]

L.Ed.2d 358 (1961); to enforce a tying arrangement, *Lessig v. Tidewater Oil Co.,* 327 F.2d 459 (9th Cir. 1964); to create a monopoly in a product market, *Poller v. Columbia Broadcasting System, Inc.,* 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962), or to further strengthen an already dominant market position. *Eastman Kodak v. Southern Photo Materials Co.,* 273 U.S. 359, 47 S.Ct. 400, 71 L.Ed. 684 (1927).

Bushie v. Stenocord Corp., 460 F.2d 116, 119 (9th Cir. 1972).

[14] *E.g., Burdett Sound, Inc. v. Altec Corp., supra,* 515 F.2d at 1248 (agreement, but no anti-competitive intent or effect); *Bushie v. Stenocord Corp., supra,* 460 F.2d at 120 (proof of and concession of agreement, but lack of anti-competitive purpose); *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.,* 416 F.2d 71, 78 (9th Cir. 1969), *cert. denied,* 396 U.S. 1062, 90 S.Ct. 752, 24 L.Ed.2d 755 (1970) (went off not on lack of agreement but on lack of any evidence of anti-competitive motive for terminating and lack of proof of anti-competitive practices); *Ace Beer Distributors, Inc. v. Kohn, Inc.,* 318 F.2d 283 (6th Cir.), *cert. denied,* 375 U.S. 922, 84 S.Ct. 267, 11 L.Ed.2d 166 (1963) (went off on lack of anti-competitive motive or effect, not on lack of conspiracy).

Amstar compares its offering some of the terminated general brokers positions as direct brokers to the situation in Bowen, *supra,* where the Second Circuit upheld a newspaper publisher's offering a franchise to some but not all of the independent carriers it was terminating. Amstar's reliance on Bowen is misplaced, however, inasmuch as Bowen did not go off on the absence of combination or conspiracy, but on the absence of an anti-competitive purpose and effect. *Id.* at 1252-53, 1254. The Court reasoned that when the defendant substituted exclusive franchisees for independent carriers who had previously sold not only defendant's newspapers but those of its competitors the substitution was not motivated by and would not have the effect of eliminating competition from other newspapers inasmuch as it was contemplated that the franchisees would sell, rather than abandon, their independent routes. *Id.* at 1254. The instant case is directly to the contrary: the very purpose of inviting general brokers to become direct brokers was to prevent them from representing competing refiners.

Amstar's reliance on *Oreck Corp. v. Whirlpool Corp.,* 563 F.2d 54, 58 (2d Cir. 1977), is entirely misplaced as the narrow holding of that case—that it was plain error to have in effect charged a *per se* rule in instructing the jury that the facts, if found to be true, would constitute a violation—has no application to this case.

II. *No Causal Connection Between Violation and Injury Sustained By Plaintiffs*

The thrust of this argument seems to be that: the combination, if any, was between Amstar and two of its Midwestern general brokers (Fox and Waller) who agreed to become direct brokers; this combination could not have injured plaintiffs inasmuch as plaintiffs did not compete in the Midwest; in the Northeast where plaintiffs do compete, and where their injury, if any, would have occurred, the general brokers were replaced by Amstar employees; because, as a matter of law, Amstar and its employees could not constitute a combination, plaintiffs were not harmed by any combination.

There are a number of flaws in this argument. First, there is evidence in the record that as an Amstar direct broker Fox called on RKO Bottlers, an account upon which Prael was calling on behalf of Sucrest, and that Waller had national accounts throughout the United States whereby he competed with all brokers selling on a national basis, including Fuchs and Prael. From this the jury could have inferred that some of the business plaintiffs lost was due to direct competition from Fox and Waller. Second, just as the terminations could not be viewed in isolation from what motivated them and resulted from them, so too the combinations cannot be viewed in isolation from the *overall* plan they facilitated. In order for the plan to succeed, Amstar had to be able to replace the general brokers with experienced substitutes. Fox and Waller, in providing experience, materially aided and abetted the *overall plan*. Therefore, if the overall plan injured plaintiffs and Fox and Waller contributed to the success of the plan, then Fox and Waller contributed to plaintiffs' injury. Third, as discussed *supra*, Fox and Waller were not the only possible

members of a combination or conspiracy. Fourth, the Court is of the view that the causal connection must be between plaintiffs' injury and the antitrust violation, rather than between plaintiffs' injury and the combination. *Billy Baxter, Inc. v. Coca Cola Co.*, 431 F.2d 183, 187 (2d Cir. 1970), *cert. denied*, 401 U.S. 923, 91 S.Ct. 877, 27 L.Ed.2d 826 (1971). Thus, the question is whether there is a causal connection between plaintiffs' injury and the illegal restraint of trade, namely, suppression of price competition, attempted price stabilization and enhancement of Amstar's power to control the movement of sugar within the market generally.

It should first be noted that plaintiffs introduced sufficient evidence through their expert, Peter Max, whereby the jury could have found that plaintiffs lost business and therefore were injured by virtue of the termination of their representation of Amstar.

Amstar appears to contest plaintiffs' standing to assert this injury, however, relying on *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930, 92 S.Ct. 1776, 32 L.Ed.2d 132 (1972); *Billy Baxter, Inc. v. Coca-Cola Co., supra*, 431 F.2d 183, and *Productive Inventions, Inc. v. Trico Products Corp.*, 224 F.2d 678 (2d Cir. 1955), *cert. denied*, 350 U.S. 936, 76 S.Ct. 301, 100 L.Ed. 818 (1956). The plaintiffs in those cases were not within the "target area" because their injury was derivative of the injury to the target. By contrast, because Fuchs and Prael were deliberately selected by Amstar as the means to the end restraint and they were harmed as a result, their injury was not derivative of the injury to Amstar's competitors or customers; in fact, the injury to Amstar's competitors and customers in a sense was derivative of the harm caused plaintiffs by the four-phase plan to control

and ultimately terminate all the general sugar brokers. Accordingly, plaintiffs were within the target area and therefore have standing. *See Bravman v. Bassett Furniture Industries, Inc.*, 552 F.2d 90, 100 (3d Cir.), *cert. denied*, ___ U.S. ___, 98 S.Ct. 69, 54 L.Ed.2d 80 (1977); *cf. International Railways of Central America v. United Brands Co.*, 358 F.Supp. 1363, 1370, 1372, 1373 (S.D.N.Y. 1973), *aff'd on other grounds*, 532 F.2d 231 (2d Cir. 1976). *See generally* Berger & Bernstein, An Analytical Framework for Antitrust Standing, 86 *Yale L. J.* 809 (1977).

Similarly, the Court believes that plaintiffs proved there was a causal connection between the injury and the antitrust violation: the terminations facilitated the anticompetitive restraint and therefore were part of the violation; the terminations injured plaintiffs; therefore, plaintiffs' injury was causally related to the violation.

Nonetheless, Amstar argues that the recent Supreme Court decisions of *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977) and *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977) require judgment in its favor. The Court believes only the latter to be relevant.

Brunswick held

> that for plaintiffs to recover treble damages on account of § 7 violations, they must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause."

429 U.S. at 489, 97 S.Ct. at 697, *quoting Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 125, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969) (emphasis in original). Put simply, private plaintiffs in § 7 suits must prove not merely that their "loss occurred 'by reason of' the unlawful acquisitions [but rather that it occurred] 'by reason of' that which made the acquisitions unlawful." *Id.* 429 U.S. at 488, 97 S.Ct. at 697. Assuming that *Brunswick* applies in a § 1 suit, *but see* Handler, Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term—1977, 77 *Colum.L. Rev.* 979, 992 n.76 (1977), by a parity of reasoning Fuchs and Prael would have to prove not merely that their injury occurred by reason of their termination, but that it occurred by reason of that which made the terminations unlawful. What made the terminations unlawful was that the purpose and effect of the overall plan which culminated in the terminations was to enhance Amstar's power over the price and movement of sugar in the market generally by restricting the general broker's ability to compete. In the case of those who went along with the plan, *e.g.*, ABD, Fox and Waller, the purpose was achieved by their giving up the right to handle directly competitive lines and exert downward pressure on prices. In the case of plaintiffs, who ultimately refused to go along, the purpose was achieved by their being rendered less effective by their inability to offer Amstar products. Because Amstar is the industry giant, particularly in the Northeast where plaintiffs' efforts are concentrated, and because Amstar offers a wide variety of specialty items not available from other refiners and is a large reliable source of supply, the ability to offer Amstar products in addition to those of other

refiners has a "door-opener" effect. Conversely, there was ample proof that because plaintiffs cannot offer Amstar products along with other refiners' products they have been foreclosed from competing for certain customers' accounts. *See Greene v. General Foods Corp., supra,* 517 F.2d at 664. Thus, plaintiffs' injury was causally connected to that which made the terminations unlawful.

III. *Section 2(c) of the Robinson-Patman Act, 15 U.S.C. § 13(c), Would be Violated by Plaintiffs' Receipt of Brokerage Commissions; Therefore, Termination of Brokerage Commissions in Order to Avoid Such a Violation is a Complete Defense to Plaintiffs' Claimed Sherman Act § 1 Violation*

Section 2(c) of the Robinson-Patman Act, 15 U.S.C. § 13(c), provides:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein *where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.* (emphasis added).

For purposes of its Robinson-Patman defense, Amstar contends that the general sugar brokers were in fact buyers' agents and therefore it violated § 2(c) for the refiners to

pay and the brokers to accept compensation.[15] It follows, Amstar contends, that Amstar could not be found liable under the Sherman Act for terminating a practice which violated § 2(c) of Robinson-Patman; therefore, the existence of a § 2(c) violation was a complete defense to the finding of a § 1 violation.

In asserting that plaintiffs were "in fact" acting on behalf of sugar purchasers, Amstar does not suggest that plaintiffs were not its agents. Rather, its position is that because plaintiffs at times made recommendations which were in the best interest of the customers they were in fact acting on behalf of such customers and must have been acting adversely to the interests of Amstar, making them unfaithful Amstar agents. The only difficulty with this position is that, contrary to Amstar's protestations, the question of whether plaintiffs acted primarily, as opposed to incidentally, for the benefit of customers is factual and was for the jury to decide.[16] The jury resolved

---

[15] In connection with Amstar's Robinson-Patman defense, the jury was charged in pertinent part as follows:

> This provision of the Robinson-Patman Act prohibits compensation by a seller to an agent, representative or other intermediary, if that agent is in fact acting on behalf of the purchaser.
>
> Now, merely because that agent provides incidental or supplementary services for the purchaser such as tracking orders, placing orders, providing sales information and the like, does not mean that the agent is acting on behalf of the purchaser. So, if that is all that you find these plaintiffs did for purchasers, then it was legal for the seller, defendant, Amstar to pay them brokerage. However, if you find, by a preponderance of the evidence, that either or both plaintiffs in this case were acting primarily for the benefit of purchasers in attempting to reduce the price of sugar, rather than primarily for their own benefit in securing commissions, or primarily for the benefit of Amstar in securing the sale of Amstar's sugar, then you must find that that plaintiff or both plaintiffs in this action have violated the Robinson-Patman Act. Amstar objected to the insertion of the words "rather than primarily for their own benefit in securing commissions."

[16] Amstar urged that whether plaintiffs were in fact acting on behalf of customers was a question of law which must be resolved in

this issue against Amstar[17] and that finding will not be disturbed inasmuch as there was ample evidence from which the juiry could have inferred that plaintiffs were in fact acting primarily either for the sellers or for themselves.[18] If they found that plaintiffs acted primarily

its favor on the basis of certain inferences that could be drawn from Stipulations of Fact 18, 22, 35, 36, 37, and 39. Suffice it to say that these stipulations are susceptible of more than one inference and therefore the question was properly left to the jury.

Amstar also cited portions of the Federal Trade Commission's Trade Practice Rules for the Fresh Fruit and Vegetable Industry, 16 C.F.R. §§ 74 *et seq.*, as indicative of how the issue must be resolved. Even assuming that rules formulated on the basis of practices within the fruit and vegetable industry would have application to the sugar industry where practices, such as brokerage always being paid by the refiner, may be different, these rules merely set forth guidelines, not determinants. The rules themselves emphasize that

> [i]n determining whether a broker acts for a buyer or a seller, each transaction must be considered on its own facts. A rule of general applicability can be helpful only in clarifying the pertinent legal principles and affording guidance to industry members in the application of these principles to particular situations. 16 C.F.R. § 74.2(c)(1)(ii)(c) *Example No. 2.*

[17] The jury was asked:

> Do you find by a preponderance of the evidence that either plaintiff Fuchs Sugars & Syrups or plaintiff Francis J. Prael, doing business as Lewis & Company, or both, acted primarily for the benefit of purchasers in attempting to reduce the price of sugar rather than primarily for their own benefit in securing commissions, or primarily for the benefit of Amstar in securing the sale of Amstar sugar?

The answer was negative as to both Fuchs and Prael.

[18] The jury was entitled to take into account that Amstar knew that the marketing system it used (simultaneous representation of multiple refiners and compensation based on volume of sugar sold) was structured in accordance with the general broker's self-interest. Therefore, Amstar knew that the system dictated that the broker would be inherently adverse to the refiner and would have no inherent incentive to owe allegiance to any particular refiner. Based on this the jury could have found that the plaintiff general brokers were not merely agents of the multiple refiners they served, but were in fact intermediaries pursuing their own interest to the benefit of buyers and sellers and to the detriment of neither. *See In re Food Fair Stores, Inc.*, 83 F.T.C. 1213, 1227 (1973) (decision of administrative law judge), *modified* [1973-1976] Trade Reg.Rep. (CCH) ¶ 20,519 (F.T.C.1974) (affirmed administrative law judge finding based

for the seller, then, as a matter of law, there could not possibly have been a § 2(c) violation. Whether there was a violation if the jury found that plaintiffs acted primarily for themselves, rather than for either the buyer or seller, is a question of law the Court will now explore.[19]

Amstar relies on *Great Atlantic & Pacific Tea Co. v. FTC,* 106 F.2d 667, 674-75 (3d Cir. 1939), *aff'g,* 26 F.T.C. 486 (1938), *cert. denied,* 308 U.S. 625, 60 S.Ct. 380, 84 L.Ed. 521 (1940), and *Quality Bakers of America v. FTC,* 114 F.2d 393, 399 (1st Cir. 1940), which contain language to the effect that under § 2(c) of Robinson-Patman a broker cannot be a dual agent of a buyer and a seller, or, more accurately, cannot be a true intermediary who acts in his own best interest in securing commissions by consummating as many sales as possible and in so doing benefits both the buyer and the seller. However, in both cases the language is dictum, the facts are distinguishable and these precedents would not otherwise be controlling in any event. Moreover, there is recent authority to the contrary,[20] and the question has been left

on admission of complaint counsel that evidence complaint counsel intended to offer would not support finding that broker was acting for buyer). Moreover, there was other evidence to support a finding that plaintiffs did not favor the purchaser's interest over the seller's interest. For example, one of Amstar's own witnesses, Martin William Goldberg, Director of Grocery Purchasing for Wakefern Food Corporation, testified in answer to written interrogatories that "In our judgment, no sugar brokers acted specifically in our interests at any time."

[19] Amstar contends that the charge and special jury question on this point purportedly made plaintiffs' motive relevant and that this was error inasmuch as there is nothing in the language or history of § 2(c) to suggest that motive is a factor. The Court is of the opinion, however, that when it in effect asked the jury to distinguish between a buyer's agent, seller's agent or intermediary it was merely instructing the jury to look at the totality of the circumstances and base its finding with respect to plaintiffs' function and status on the realities of the situation.

[20] *In re Food Fair Stores, Inc., supra* at 1225-28; *Tillie Lewis Foods, Inc. v. Flotill Products, Inc.*, 65 F.T.C. 1099, 1111, 1114 (1963), *aff'd,* 65 F.T.C. 1131 (1964).

open in this Circuit.[21] For these reasons, the Court deems it appropriate to approach the issue anew, in light of the purpose of § 2(c) and the abuses at which it was directed.

"The Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power." *FTC v. Henry Broch & Co.,* 363 U.S. 166, 168, 80 S.Ct. 1158, 1160, 4 L.Ed.2d 1124 (1960). *See generally* Fulda, Food Distribution in the United States, the Struggle Between Independents and Chains, 99 *U.Pa.L.Rev.* 1051 (1951). The chief devices employed by large buyers to coerce secret price concessions were "to demand the allowance of brokerage direct to them upon their purchases, or its payment to an employee, agent, or corporate subsidiary whom they set up in the guise of a broker, and through whom they demand that sales to them be made." *Great Atlantic & Pacific Tea Co., supra,* 26 F.T.C. at 503, 504, *quoting* Sen. Rep. No. 1502, 74th Cong., 2d Sess. at 7 and H.R.Rep. No. 2287, 74th Cong., 2d Sess. at 14. In other words, the primary concern of § 2(c) was the large buyer's use of "discounts in lieu of brokerage" and "dummy brokerage." *Henry Broch & Co., supra,* 363 U.S. at 169, 80 S.Ct. 1158; *In re Borman Food Stores, Inc.,* 81 F.T.C. 201, 207 (1972) (Elman, Comm'r, dissenting from issuing complaint) (*Food Fair* case); Calvani, Functional Discounts Under the Robinson-Patman Act, 17 *B.C.Ind. & Comm. L.Rev.* 543, 557 (1976); Schiering, The Robinson-Patman Act: Is Section 2(c) Back?, 26 *Case Wes.Res.L.Rev.* 594, 597 (1976). Accordingly, most § 2(c) cases, including the

[21] *See FTC v. Herzog,* 150 F.2d 450, 451 (2d Cir. 1945); *Biddle Purchasing Co. v. FTC,* 96 F.2d 687, 691 (2d Cir.), *cert. denied,* 305 U.S. 634, 59 S.Ct. 101, 83 L.Ed. 407 (1938).

majority of the cases relied upon by Amstar,[22] involved these abuses. Inasmuch as these abuses are not involved here, this line of precedent is distinguishable.

There is legislative history, however, which indicates some passing concern with preventing abuses of the fiduciary relationship between broker and client. Sen.Rep. No. 1502, 74th Cong., 2d Sess., at 7 states:

> Among the prevalent modes of discrimination at which this bill is directed, is the practice of certain large buyers to demand the allowance of brokerage direct to them upon their purchases, or its payment to an employee, agent, or corporate subsidiary whom they set up in the guise of a broker, and through whom they demand that sales to them be made. Whether employed by the buyer in good faith to find a source of supply, or by the seller to find a market,

[22] In *Great Atlantic & Pacific Tea Co., supra,* the brokers were agents of the buyer, rendered no services to the seller, and the unearned commissions paid them by the seller were passed on to the buyer as a "quantity discount." In *Quality Bakers of America, supra,* the seller paid brokerage to a corporation owned by and acting for the buyer. This buyer's agent did not actually render service to the seller and most of the unearned commissions were indirectly passed on to the buyer. In *Biddle Purchasing Co. v. FTC,* 96 F.2d 687 (2d Cir.) *cert. denied,* 305 U.S. 634, 59 S.Ct. 101, 83 L.Ed. 407 (1938), which did not resolve the legality of one party's compensating an intermediary broker, the seller paid a broker under the buyer's control and acting as the buyer's agent, knowing that the commissions would be paid over to the buyer, thus giving the buyer a discount. In *FTC v. Herzog,* 150 F.2d 450 (2d Cir. 1945), which again left open the question of the legality of compensating an intermediary, the brokers admitted in their answer that they acted as agents for fur garment retailers (buyers), they placed orders with manufacturers "at 'the most advantageous price from the standpoint of the buyer,' [and] . . . other competitive retailers . . . 'under[went] buying expense by maintaining buying offices, retain[ing] the services of . . . "fee" buyers, or send[ing] representatives to New York City to make fur garment purchases.' This result[ed] in a price discrimination in favor of the retailers who [did] business with the [brokers] . . . ." *Id.* at 452. *FTC v. Henry Broch & Co., supra,* likewise involved what the Court found to be an allowance in lieu of brokerage.

the broker so employed discharges a sound economic function and is entitled to appropriate compensation by the one in whose interest he so serves. But to permit its payment or allowance *where no such service is rendered,* where in fact, if a "broker," so labeled, enters the picture at all, it is one whom the buyer points out to the seller, rather than one who brings the buyer to the seller, is but to permit the corruption of this function *to the purposes of competitive discrimination.* The relation of the broker to his client is a fiduciary one. To collect from a client for services rendered in the interest of a party adverse to him, is a violation of that relationship; and to protect those who deal in the streams of commerce against breaches of faith in its relations of trust, is to foster confidence in its processes and promote its wholesomeness and volume. (emphasis added).

H.R.Rep. No. 2287, 74th Cong., 2d Sess., at 14 states:

[This section] deals with the abuse of the brokerage function *for purposes of oppressive discrimination.* . . . [T]he positions of buyer and seller are by nature adverse, and it is a contradiction in terms incompatible with his natural function for an intermediary to claim to be rendering services for the seller when he is acting in fact for or under the control of the buyer, and no seller can be expected to pay such an intermediary so controlled for such services *unless compelled to do so by coercive influences in compromise of his natural interest.* (emphasis added).

It is apparent from reading this legislative history in context, that in enacting § 2(c) Congress was not motivated by an abstract concern for protecting or regulating the fiduciary relationship between broker and client. Rather, the concern with the perversion of the fiduciary relationship was incidental to the related,

primary objective of eliminating price discrimination caused by oppressive tactics of large buyers who abused the brokerage function. However, there is dictum in *FTC v. Broch & Co., supra,* 363 U.S. at 169-70 n.6, 80 S.Ct. at 1161, stating that "although not mentioned in the Committee Reports, the debates on the bill show clearly that § 2(c) was intended to proscribe other practices such as the 'bribing' of a seller's broker by the buyer. See 80 Cong.Rec. 7759-7760, 8111-8112."

Based on the above-quoted committee reports and the dictum in *Broch,* it has been held that § 2(c) covers commercial bribery "where [the] violation has an anti- competitive effect," *Grace v. E. J. Kozin Co.,* 538 F.2d 170, 173 (7th Cir. 1976), or "[gives] one seller a grossly unfair advantage over a competing seller," *Rangen, Inc. v. Sterling Nelson & Sons,* 351 F.2d 851, 857 (9th Cir. 1965), *cert. denied,* 383 U.S. 936, 86 S.Ct. 1067, 15 L.Ed.2d 853 (1966). These cases followed the landmark case of *Fitch v. Kentucky-Tennessee Light & Power Co.,* 136 F.2d 12 (6th Cir. 1943), which outlawed such payments as "an unfair trade practice, . . . obviously result[ing] in lessening competition." *Id.* at 16.

Because commercial bribery has an anti-competitive impact analogous to the discriminatory effect of dummy brokerage and other secret price concessions with which § 2(c) is primarily concerned, *cf. Grace v. E. J. Kozin Co., supra,* 538 F.2d at 174, these commercial bribery cases are reconcilable with the purpose of § 2(c). However, they are inapposite inasmuch as the jury in the instant case impliedly found that Amstar's compensating the general brokers had a pro-competitive effect. More importantly, they are inapposite because none of these cases involved a true intermediary[23]—one who is *not* "acting in fact for or

[23] Although *Rangen, supra,* denominated the malefactor (Grimes) in that case as "other intermediary," it was for lack of a better descrip-

in behalf" of the other party to the transaction,[24] as the jury could have found these plaintiffs to be.[25] On the contrary, each of these cases involved a fiduciary who committed a classic breach of faith in acting "for his own pocket," *Fitch, supra,* 136 F.2d at 15.

Amstar attempts to fit within the ambit of these commercial bribery cases by characterizing the general brokers as "faithless agents". However, the Court believes that this characterization is superficial and the jury was warranted in rejecting it for the same reasons that the jury was entitled to find plaintiffs to be intermediaries: Amstar knew that plaintiffs, unlike ordinary agents, were acting in their own self-interest and that this interest did not always accord with the interests of Amstar or any other refiner or, for that matter, the purchaser. Thus, neither Fuchs nor Prael, as general sugar brokers, could fairly be regarded as a pure fiduciary such as Fitch. *See Fitch v. Kentucky-Tennessee Light & Power Co., supra.*

tion, since Grimes did not fit precisely into the category of "agent" or "representative." It is clear on the facts that Grimes was not an intermediary in the true sense of the word. See 351 F.2d at 862.

[24] The *Fitch* court observed that the "'acting in fact for or in behalf, or . . . subject to the direct or indirect control'" language in § 2(c) modifies only intermediaries, not representatives or agents of buyers.

"The qualifying words were used for the purpose of excluding from the act legitimate brokerage, which is is [sic] no wise [sic] condemned by the act. *Since a broker would be an 'intermediary', legitimate brokerage would be included and made illegal unless such qualifying words were used. The act catches such intermediaries as are acting for the buyer or under the buyer's control,* without being an agent or representative in the legal sense of the word."

136 F.2d at 15, *quoting the opinion below,* 37 F.Supp. 728, 734 (W.D.Ky.1941) (emphasis added). The implication of this passage is that not all intermediaries act for or are under the control of buyers: therefore, compensation of an intermediary is not *per se* a violation.

[25] See notes 17 and 18, *supra,* and accompanying text.

At the same time, the pursuit of plaintiffs' self-interest did not necessitate their being actually adverse to either side of the transaction. Therefore, to the extent that there was a conflict between plaintiffs and Amstar, it certainly was not comparable to a breach of trust such as that committed by Fitch.

For the foregoing reasons, and inasmuch as the commissions paid Fuchs and Prael were for services actually rendered, the Court does not perceive any policy reason why § 2(c) should proscribe a true intermediary's being compensated by one of the parties benefitting from the intermediary's services.[26] Therefore, the Court holds that as a matter of law § 2(c) of the Robinson-Patman Act was not violated.

This holding makes in unnecessary to reach the question of whether such a Robinson-Patman violation should be a complete defense to a Sherman Act § 1 violation, *See Kentucky Rural Electric Corp. v. Moloney Electric Corp.,* 282 F.2d 481, 484 (6th Cir. 1960), *cert. denied,* 365 U.S. 812, 81 S.Ct. 692, 5 L.Ed.2d 691 (1961) (held § 2(c) violation was defense to plaintiff's claim under other sections of the Robinson-Patman Act); *cf. United States v. United States Gypsum Co.,* 550 F.2d 115 (3d Cir.), *cert. granted,* ____ U.S. ____, 98 S.Ct. 52, 54 L.Ed.2d 71. Moreover, the Court notes that it is somewhat disingenuous of Amstar to assert such a defense when the evidence in the record suggests that the terminations were not motivated by a desire to avoid such violations.

[26] *See Food Fair Stores, Inc., supra; Tillie Lewis Foods, Inc. v. Flotill Products, Inc., supra,* 65 F.T.C. at 1111, 1114; *id.* at 1149-50 (Elman, Comm'r, concurring); *cf. In re Hruby,* 61 F.T.C. 1445 (1962). *See also In re Borman Food Stores, Inc.,* 81 F.T.C. 201, 203 (1972).

CONCLUSION

Defendant's motion for judgment notwithstanding the verdict is denied; decision on plaintiffs' attorneys' fee application is deferred pending appeal.

The Court believes that the interests of justice require that judgment be entered *nunc pro tunc* as of March 17, 1977, the date of the jury's verdict.

Settle judgment on notice.